A

# DISCOURSE

UPON THE

# REMOVING of TENANTS,

PUBLISHED TO SERVE AS A SPECIMEN OF THE

# LECTURES

INTENDED TO BE DELIVERED

Upon the PRACTICE of the LAW of SCOTLAND,

BY

WALTER ROSS, WRITER TO THE SIGNET.

---

PLURIMA ERIT IN OMNI JURE CIVILI ANTIQUITATIS EFFIGIES, ET PRISCA VERBORUM VETUSTAS, *ET ACTIONUM GENERA QUAEDAM*, QUÆ MAJORUM CONSUETUDINEM VITAMQUE DECLARABANT. *Cic. de Orat.*

---

*The Class is to be opened upon the 18th of November next.*

EDINBURGH.

PRINTED BY MUNDELL AND WILSON, ROYAL BANK CLOSE;

AND SOLD BY

WILLIAM GIBB, BOOKSELLER, PARLIAMENT-HOUSE.

MDCCLXXXII.

A

# DISCOURSE

UPON THE

# REMOVING of TENANTS.

'THE first act of property (says Sir Thomas 'Craig*) exercised by a purchaser of 'lands, or a vassal infeft, is to give warning 'to the whole tenants of his lands to remove, 'unless they acknowledge him for their Master, 'and consent to hold their possessions thence-'forth, upon such terms as he is pleased to im-'pose: And thus ('*Sui tituli vires undique ex-'ploret.*') he effectually tries the strength of 'his titles, against every other person pretend-'ing to any separate right, whether of pro-'perty or possession.'

At this period, lands were affected with a variety of incumbrances, which have since that time vanished out of practice.—Besides the particulars known to us at present, there were then



* De migrando, p. 1.

Hornings expired year and a day—Baſe Infeftments clad with poſſeſſion — Infeftments in ward-land, not confirmed—Expired Compriſings, and many others, which created trouble and expence to purchaſers.

A General Removing was, in thoſe days, a method of diſcovering theſe latent evils.—But, now that their number is decreaſed, and the ſyſtem of our Regiſters compleated, this action has given place to that of Reduction and Improbation, againſt every perſon, who, by the records, appears to have any kind of right.

'Anterior (continues Craig) to the 1560 *, 'the method of removing was this.—The Ma- 'ſter came to the tenant's houſe, and verbally 'warned, or gave him notice, to remove at the 'enſuing term of Whitſunday. This done, he 'broke a *wooden platter, or meat-diſh* †, into 'two parts—as a ſymbol of all agreement and 'connection being thenceforth at an end be- 'tween the tenant and himſelf.'

The diſh broken upon this occaſion, muſt have appeared very ſignificant. — The tenant was to *eat no more* of the produce of theſe lands.

'If

* It ſhould have been 1555.

† Lord Stair calls it a Lance, and Mr Erſkine diminiſhes it to a Wand. The words uſed by Craig are *Lancem (ligneam, ſive diſcum eſcarium)* not *Lanceam.*——*Lanx* is a Diſh or Platter—*Lancea* is Latin for a Lance.—I can find, therefore, no authority either for the Lance or the Wand.

'If the tenant did not willingly remove *
'upon the ſecond day after Whitſunday †, the
'Maſter forced him and his family out of the
'houſes, and drove his cattle out of the fields;
'after which, the Maſter's cattle were immedi-
'ately put on. But, as it often happened that
'the tenant, unwilling to remove, and truſting
'to his friends, oppoſed force to force, who-
'ever got the better in the fray, kept the poſ-
'ſeſſion.—If the Lord, therefore, found himſelf
'unable to remove his tenant, he had no other
'remedy but an action for the violent profits.'

The natural mode of recovery, either of moveables or land unjuſtly detained, is to lay hold of the one, when an opportunity offers; and to enter upon, and take poſſeſſion of the other, by expelling the intruders. Theſe were the methods of procuring juſtice in rude ages, and muſt take place at all periods, in degrees proportionable to the feebleneſs or ſtrength of Civil Government. If the Laws of England and Scotland were at one period the ſame (a truth which may now be aſſumed as demonſtrated) how did it happen, that the *removing of tenants* in the South, had, long before the fifteenth century, proceeded quietly, and according to eſtabliſhed rules? — The enquiry is intereſting: it muſt

* P 2. c. 4.

† The Ejection conſequently was executed upon the third day after the term.

muſt throw light upon the manners of the times in both nations, and ſupply the hiſtory of this part of Practice, about which our Writers have left us almoſt entirely in the dark.

The inhabitants of the whole iſland, for a long period, knew no other methods than the natural ones I have mentioned. The antient Feudal Lords uſed very little ceremony with their vaſſals and tenants. When they choſe to rid themſelves of any of theſe dependents, they often did it by *force of arms:* and as to their villains, force was not neceſſary; the men and their poſſeſſions lay entirely at their mercy. The party who from weakneſs had ſuffered the injury, was obliged to apply to the Law (for the Law is always the refuge of the weak) which allowed him a writ, *i. e.* an order from the King to the Sheriff, to try the complaint regarding his being forcibly deprived of the lands there mentioned. If it appeared that the perſon complained upon, had himſelf a preferable right to the lands, in that caſe, his attack upon the other was juſtified; if not, the complainer was reſtored by authority of the Prince.

When the *Roman Law* came to be ſtudied in Britain, it ſuggeſted, That no ſubject in the peaceable poſſeſſion of his property, ought to be deprived of that poſſeſſion by private violence; and that, wherever this rule was infringed,

ged, the former poſſeſſor ſhould immediately be reſtored, without any regard to the point of right. In ſhort, the *petitory* and *poſſeſſory actions* were adopted, and imitated.—Accordingly (as we are taught by the Engliſh Lawyers) the *Aſſiſe of nouvelle diſſeiſine* was introduced, in order to reſtore the poſſeſſion, of which any perſon had been deprived. It was termed an Aſſiſe, from *aſſideo*, or the ſitting together of Judges, the ſame as *Sederunt* with us; and *nouvelle diſſeiſine*, from the recency of the wrong.—Lord Coke informs us, that the Judges held theſe *aſſiſes* at ſtated periods; and it was neceſſary that all the wrongs preceding that aſſiſe ſhould be brought before it, otherwiſe they could not be heard. Theſe were termed *ancient diſſeiſines*; and thoſe poſterior to the aſſiſe, *nouvelle diſſeiſines*.

All entries of private parties upon land, were appointed to be gone about in *a peaceable and quiet manner* *: they ſunk, therefore, into mere ſymbols, and writs were framed to anſwer the various caſes that occurred.—By virtue of theſe writs, every queſtion regarding the poſſeſſion of lands, came at laſt to be determined; and, among others, the rights of proprietors and their tenants by leaſes, or, as the Law denominates them, *tenants for terms of years*; and almoſt exactly by the ſame proceſs, as if a leaſe had

* Stat. 5. Richard II. cap. 8.

had been a *real eſtate* in the perſon of the tenant. It was not a real eſtate; but it was eſtabliſhed by a deed equally formal, and containing the ſame clauſes as a charter.—The mode of trial which thus took place, greatly heightened the ſimilitude. If a tenant refuſed to remove, the proprietor made an entry upon the land, and put him out. If the tenant ſuffered this, and it happened to be wrongfully done, the tenant was then held to be *diſſeiſed*, and became entitled to the proper writ, in order to recover the poſſeſſion.—If, on the other hand, he refuſed to move notwithſtanding the entry, no force could be uſed: the Maſter was held to be *diſſeiſed* by his tenant, and could do no more than try his action as the Law directed.

Similar manners in Scotland produced ſimilar remedies, and eſtabliſhed the ſame proceſs in every other right relating to property, but that of *tacks*.—Our ancient Laws abound with regulations reſpecting the *nouvelle diſſeiſine*:—we have the form of the Brieve, and procedure upon it:—we have all the caſes and niceties of the action minutely pointed out in the old code. Still, however, theſe Laws did not all at once take violence out of private hands.—Various caſes occurred, to which the writ did not apply; and, upon theſe occaſions, the old *brevi manu* method was alwiſe revived.

—To

—To prevent this, Robert the First, in imitation of Laws made in England, extended the *writ of disseisine* to all other known cases: and having thus provided a legal remedy, he ordains, 'That whosoever shall be found to commit disseisine with *force and armour*, after the publication of this Statute, he shall be imprisoned, and pay to the King a great amerciament, at the King's will.' *

These actions, at first, were not adequate to the evil, either in England, or in Scotland: they went no farther than the *possession*; the question of right might afterwards have been tried by the *breve de recto* †. The *nouvelle disseisine*, then, had the same effect as the posterior *process of ejection and intrusion*, i. e. the restitution of the possession to the person deprived of it by private violence. It restored the tenant, if unjustly deprived of his estate, in the lands; and it restored the possession of the lands to the Lord, if it happened to be illegally with-held by the tenant.

In small properties, such as *tenements within burgh*, these double actions proved distressful to the lieges.—To remedy this, we find, in the *Leges Burgorum*, a Statute of Robert Bruce, made 'for help of the Poor anent recent de-



* 1st Stat. Robert I. cap. 12.

† According to the modern practice by the Declarator of Property.

'forcement within burgh.'—After directing a plain and ſummary mode of proceſs to be obſerved by the Magiſtrates, the Statute declares, 'That he againſt whom the Aſſiſe delivers, 'ſhall never afterwards be heard thereanent.' This act further contains an enumeration of the different rights, of which people were uſually diſſeiſed; ſuch as, *wadſets*, *liferents*, *annual-rents*, *&c.* In ſhort, every act which diſturbed a man's poſſeſſions, or by which his payment happened to be with-held, became a kind of *civil wrong*, and was tried as *a deforcement*; exactly as in England, where the forms, as we ſhall afterwards find, are preſerved in practice to this moment.

In the very ancient caſes of Ejectment amongſt us, no inſtances are to be found of one being brought by tenants upon leaſes for *term of years* *.—In England, on the contrary, ſuch tenants were generally the plaintiffs in theſe actions.—The complainers, in Scotland, appear always to have been *proprietors of the ſubjects* demanded;—a circumſtance, which proves, that tenants for term of years were either *little known with us*; or, what is more probable, their leaſes were

* Balfour indeed (p. 208.) mentions the form which a tenant by leaſe is to purſue for recovery of his poſſeſſion and damages; and it is marked R. M.—But, from every circumſtance, 'tis evident that this form relates to the cuſtom eſtabliſhed in the time of the Jameſes, which he meant to ſupport by inference from the R. M.

were for a long time not conſidered as of any value or importance; and the holders, dejected by poverty and habitual oppreſſion, were unable to procure themſelves juſtice.—If, with ſome of our beſt Writers, we ſuppoſe the whole labourers of the earth to have been *villains*, or *bond-men*, at theſe periods, this circumſtance will be perfectly accounted for.

Even when tenants, by a change of manners, arrived at ſome conſideration—when tacks came to be noticed by law, they were not allowed to have any ſimilitude to rights of property: they were held to be mere *perſonal agreements*, of very ſlender conſideration.—The brieves of deforcement had only been granted to proprietors by *infeftment*; and, therefore, it is extremely probable that the benefit of them was refuſed to tackſmen, who, according to the later ideas of the Scots inveſtiture, could not be ſaid to be *diſſeiſed*.—Till the Act, therefore, of James the Second 1449, tenants were turned out of their poſſeſſions *manu forti*, and without any ceremony. Among the powers given to the Lords of Seſſion ſome years afterwards, the ſpoliation of tacks and maillings is particularly committed to their cogniſance*: and, from a deciſion reported by Balfour, it appears, that even ſo late as 1549, a tenant forcibly ejected from his

 farm,

* 14th Parl. c. 61. 1457.

farm, had not an action againſt the ejector for being reſtored, if that ejector happened to be a ſtranger or third party: it was found that ſuch an action belonged only *to the Maſter*. Laird of Durie *contra* Stephen Duddiſton.

The rule is originally an Engliſh one. A tenant *ouſted* or diſſeiſed, had antiently no remedy, but an action for breach of contract againſt the ejector. But, ſays Sir William Blackſton*, 'If the ouſter was committed by a mere 'ſtranger, the leſſer might, indeed, by a real 'action, recover poſſeſſion of the freehold; but 'the leſſee had no other remedy againſt the 'ejector, but in damages.

Afterwards, the Engliſh Courts agreed in affording the tenant a compleat remedy againſt all ejectors. They awarded both reſtitution of the land, and damage for the ouſter, and that ſo early as the reign of Edward IV. *anno* 1461, or at fartheſt of Henry VII. 1485†.—But, from the deciſion of our Court juſt quoted, the old rule ſeems to have remained in Scotland.

The tenantry, deprived, for ſuch a long time, of legal remedies, and toſſed about at the pleaſure of their Lords, began at laſt to feel their bad uſage, and to aſſume a degree of ſpirit from their numbers.—They ventured ſometimes to *diſſeiſe* their Maſters, by intruding into

* Vol. III. p. 200. † P. 201.

into their lands, or *retaining them againſt their will.* Theſe violences produced cap. 78. of James II.'s 14th Parl. 1457, 'anent *maiſterfull* 'men, wha ſchaips them to occupy, maſter-'fully, Lord's lands both ſpiritual and tem-'poral.'

The Lords, thus *deforced*, are ordered to apply to the 'King's Sheriff or Bailie, and to aſk 'their ground to be devoided of the violent 'poſſeſſors, or to ſee what reaſon they pretend; 'and if the Sheriff finds no reaſon in the occu-'pation of the ground, he ſhall devoid the 'ground *both of him and his goods*, and charge 'him, in the King's name, no further to diſ-'turb the proprietor.'

Here we have a very plain mode of Removing in James II.'s time; for the tenant *intruding*, or the tenant *retaining a poſſeſſion*, againſt the will of the Lord, was equally a *deforcer or maſterful man.*—The Statute is evidently a revival of the ancient proceſs of deforcement. The party injured complains to the Sheriff, of being diſpoſſeſſed; and the Sheriff, in virtue of this Statute, is authoriſed to take immediate trial of the matter, to eject the violent poſſeſſor, and to reſtore the lands to the owner.

This act, ſimple in its proceſs, was ſoon forgot: it was made *in favour of the Lords*, not of tenants; and theſe diſdained to have recourſe

to

to it, when poſſeſt of force enough to do their own buſineſs.

In the ſucceeding ages, every thing between maſter and tenant appears to have been carried on altogether by private violence. Some deciſions are preſerved, which indicate, that the tackſmen at times obtained juſtice, and were reſtored to their poſſeſſions, after being violently diſpoſſeſſed from lands held by tack*.—But, inſtances of redreſs were few, in proportion to the injuries received; and thus, left to themſelves, and unprotected by the Law, deſpair often drove them to repel force by force.

One part of the ancient ceremony remained. The Maſter, as Craig mentions, before removing a tenant, *broke a diſh* before his door, and commanded him to leave the lands. This was no other than the making an *entry*, which, till of late, was neceſſary to be done by every Engliſh landlord. The cutting down a tree, or any other ſymbolical act, is the warning in England, which a tenant-at-will got to remove. And the difference in the 15th century, was, that it was neceſſary for the Engliſh tenant to be ejected by the *ſentence of a Judge*; whereas, in Scotland, the landlords did this buſineſs by their *own authority*. The original writs, whether taken out by the maſter or the tenant, then

* Balfour, p. 468.

then bore, and ſtill bear, the diſſeiſine, or injury complained of, to have been done *vi et armis*. But in fact the violence remained no-where, but in the words of their proceſs. The Engliſh, in this reſpect, were compleatly civilized; while Scotland had relapſed into abſolute barbariſm, and continued in it ſo very late as the 16th century.

James the Fifth awakened in ſome degree the ſpirit of the Commons.—By his zeal and ſucceſs in the clearing the country of robbers and outlaws, one great ſource of their calamity was for the time cloſed up.—'*The ruſh-buſhes were 'ſaid to keep the cattle**.'—By his eaſy manners, the poor were encouraged to approach his perſon with their complaints. The moments of leiſure which he had in his expeditions, he ſpent in hearing and protecting the lower claſs of people. His quarrels with the Nobility foſtered this diſpoſition; and, when dead, he was gratefully remembered under the title of *the Poor man's King*.

It was at this time, alſo, that the minds of the people began to ferment with religious opinions. The Commons of Scotland, who for ages had tamely ſuffered every evil, civil and religious, which their ſuperiors had been pleaſed to inflict, now ventured to think a little for themſelves. The extreme weakneſs of Government,

* Hawthornden.

ment, and diſtractions of the Nobles, upon the acceſſion of the infant Queen *, encouraged this riſing ſpirit; and the ſame arms which were to defend religion, ſeem to have been firſt brandiſhed in defence of *tacks*, *farms*, and *poſſeſſions*. Under the new unſettled Government, the people expected no protection from the injuries of their Superiors; and, therefore, uncommon preparations were made, to maintain by force what they ſuppoſed to be their rights. The deſcription given in the following Act of Parliament, of the ſituation of this country at that period, is above the colouring of modern language †.

*4th of Auguſt* 1546.

'THE whilk day, the Lord Governor, and 'the Three Eſtaites of Parliament, ratifies and 'apprievis in this preſent Parliament, the Act 'made at Striviling the eleventh day of Junii, 'the zier of God 1546 zieres, made anentis 'the laying furth of tennents by their over 'Lords, as at mair length contained in the ſaid 'Act, of whilk the tenour follows.—"The 'whilk day, the Lord Governor, with advice 'of the Queen's Grace, and Lords of Councel, 'underſtandan that there is *great convocations* 'made in the realm, for putting and laying 'men furth of their taks and ſteadinges; and 'ſicklike,

* Mary. † 3d Parl. of Mary, cap. 2. 1546.

' ſicklike, to reſiſt to the Lords of the ground,
' their Baillies and Officiares, to lay them
' foorth; *quhilk is occaſion of great trouble and*
' *ſlaughter amongſt our Sovereign Lord's lieges:*
' Therefore, it is ſtatute and ordained, That
' letters be directed to all Scherrifs, Stew-
' ards, Baillies, and to their Deputes, and to
' uther Officiares of the Queen's Scherrifs in
' that part, to paſs to the mercat-croſs of the
' head-burrows of the ſchires, and there, be
' open proclamation, command and charge all
' and ſundrie our Sovereign Ladie's lieges, of
' whatſomever degree they be, that nane of
' them take on hand to *make any convocation*
' for putting and laying furth of any tenants;
' bot that they, be their Baillies and Officiares,
' lay furth the ſaid tenants gudes orderly, con-
' form to the laws of the realm obſerved and
' keeped in time bygane: Nor zit that na
' manner of tennents *make ony convocation or*
' *gathering*, *for reſiſtance to the Lords of the*
' *ground*, their Baillies, Officiares, under the
' pains contained in the Acts of Parliament made
' againſt them that makes ony gadderings or
' convocations; with certification to them that
' does on the contrairie, that they ſall be called
' at particular diets, and ſall be puniſhed with
' all rigour as accordis: And gif ony perſon
' thinkes them offended by others, ordains that

'they ſall be called outher criminally or ci-
'villy, and juſtice ſhall be adminiſtered as ac-
'cordis.'

By this Statute, Craig's account of removing tenants in Scotland is more than juſtified.—The Lord Governor, there mentioned, was *James Earl of Arran*, apparent Heir to the Crown, who had juſt wreſted the regency from Cardinal Beaton.

This Statute, a mere prohibitory act of power, was intended to ſecure the public peace, without applying a remedy to the evils which diſturbed it.

Tenants had often good titles to retain their poſſeſſions: they had *unexpired leaſes*, *rentals*, and other rights, to which their Maſters often paid no regard. So little attention was given to the threats of this unmeaning Act, that the common law juſtified, in many caſes, the *reſiſtance* of the tackſmen and their friends.—Balfour has preſerved deciſions, not three years poſterior in date, where the Judges determined, 'That a perſon being in poſſeſſion of lands, or 'other things, gif another attempts to put him 'furth by *way of deed*, he may defend his own 'poſſeſſion, *quia vim vi in continenti repellere* 'licet; and ſicklike, it is leiſume *for a man to* 'aſſiſt his friend, for maintenance of his own 'poſſeſſion.'—The inteſtine war, thus annually renewed,

renewed, continued to be waged for nine years longer, owing to the diſtraction of the times. At laſt, under the regency of the Queen mother *, the well-known Act paſſed anent removing of tenants.

HAVING thus endeavoured to account for the ſingularity of our Removings preceding the reign of Mary, and to ſupply the hiſtory of that matter, I proceed to conſider the Statute † which reduced it once more into order——

*20th June* 1555.

'It is ſtatute and ordained, That, in all times 'coming, the warning of *all tennents*, and o-'thers, to flit and remove fra lands, milnes, 'fiſhings, and poſſeſſions whatſoever, ſall be 'uſed in manner following: *That is to ſay*, '*Lauchful warning* being made ony time with-'in the year, 40 days before the feaſt of Whit-'ſunday, outher perſonally, or at their dwel-'ling-places, and at the ground of the lands; 'and an copie delivered to the wife or ſervandes, 'and, failzieing thereof, to be affixed upon the 'yettes or dures of the dwelling-places of the 'ſaid lands, gif onie be; and thereafter, *the* '*ſamen precept of warning* to be read in the pa-'riſh-kirk where the lands lyis, upon an Sab-'bath-day, before noon, the time of preaching



* Mary of Guiſe. † Parl. 6. cap. 39.

'and prayer; and ane copie left and affixed 'upon the maiſt patent dure of the kirk, 40 days 'before the term; and na furder laying foorth 'of ſtreſſes and removing upon Wedneſday, to 'be uſed in time to come.'

What has been ſaid, however, regarding the barbarous mode of our Removings anterior to this Statute, is to be underſtood in a more limited ſenſe, than Craig, or any of our Syſtematic Writers, have deſcribed it. The *verbal warning*, and the ſummary removing, only took place, by law, between the *granter* of the tacks, or the proprietor of whom the poſſeſſion was held, and the *poſſeſſor* holding of him, *i. e.* as the Engliſh term it, between *very Lord and very Tenant*. In moſt caſes, where they were ſtrangers to each other, deriving their property and poſſeſſion from third parties, it was requiſite that the tenant ſhould be put out by the decree of a Judge, and by the Officers of the Law; at leaſt if it was done by force, in the common way, that force was *illegal*. This is evident from the whole tract of deciſions of theſe days, preſerved by Balfour; and it is further very plain, that the Courts of Juſtice endeavoured to multiply the *number of theſe caſes*.

Neither is it to be ſuppoſed, that methods of violence were agreeable to the diſpoſitions of *all Landlords*, eſpecially in thoſe parts of the coun-

try,

try, which, *comparatively ſpeaking*, may be ſaid to have been civiliſed. The words and conception of the Act now read, not only ſupport this idea, but plainly indicate, that, by this time, the people were no ſtrangers to the greateſt part of the ſolemnities there mentioned. The Act does not ſet out by preſcribing a *written precept, and its execution, upon* 40 *days preceding Whitſunday*, as our Lawyers alwiſe ſtate it. On the contrary, it recapitulates the particulars of *lawful warning*, which are preſumed to have been already in uſe, and appoints the continuance of them.—The words *lawful warning*, are uſed as ſynonimous to *a written precept* executed 40 days before the term, by delivering copies perſonally, or at the dwelling-place of the tenant.—This being done, as already practiſed, the Statute goes on to provide for circumſtances: ‘ And, failing thereof, to be affixed, *&c.*’ *i. e.* If it cannot be ſerved in the uſual manner, let the copies be affixed upon the doors. ‘ And ‘ thereafter, the ſame precept of warning to be ‘ read, *&c.*’—But this is the *firſt time a precept* is mentioned: it was therefore clearly underſtood under the title of *Lawful Warning*; and the ceremonies at the church, are the real additions to the former proceſs, introduced by the Act. The proclamation thus ordered, ſerved a double purpoſe: it rendered it impoſſible

to

to ſurpriſe the tenant, and it gave notice to all and ſundry that his farm was to let.

Theſe proclamations, and notices, were not invented by our Lawyers upon this occaſion: they were borrowed from the French, whoſe manners, forms, and laws, had become the *ton* of the times. When a French Lord ſeized into his own hands the heretage of his vaſſal or tenant, upon account of a failure in the performance of his ſervice, or payment of his rent, the firſt ſtep was to cauſe proclamation to be made at the pariſh-church, of the failure, and of his intention to ſeize the property, and expell the poſſeſſor. This was done on each of three conſecutive Sundays, at the church-door, juſt after the ſaying of High Maſs; and the the execution of theſe proclamations (termed *Affiches)* were put upon the gate of the church, ſerved upon the parties concerned at their dwelling-houſes, and left upon the lands: And if, in 40 days after the laſt proclamation, ſatisfaction was not given, the Lord proceeded to have the property adjudged, re-united to his ſeigniory, and the former poſſeſſor removed *.

The progreſs of the other parts of this buſineſs may alſo be eaſily and naturally traced.—It was impoſſible that the Lords of the ground could

* Craig, p. 295. § 36.
Coutume de Normandie, p. 139.
Traité de Crieé, par Le Maitre.

could always go in perſon, to break the *diſh* before the tenant's door, as Craig and Lord Stair tell us: they therefore were obliged to grant *precepts* to others, to do it for them.

In the caſes I have mentioned, where a decree of a Judge was neceſſary, it was requiſite that theſe warnings ſhould be *proved;* and conſequently, *written precepts and executions* had often been indiſpenſibly neceſſary.—Here is direct evidence of their exiſtence. 'A tackſman 'in poſſeſſion (ſays Balfour) may warn and 'remove, by *his own precept* allenarlie, and '*without his Lord's precept*, his ſubtenant.'—And, for this propoſition, ſeveral deciſions in the 1541 and 1542, are quoted, 13 years before the Statute in conſideration.

Nor is the ſource of theſe new forms far to ſeek.—I have, upon a former occaſion, ſhown you, that *wadſets* and *reverſions* were among the oldeſt of our writs in Scotland.—The redemption of wadſet-lands was nothing elſe but a warning, and a removing of the wadſetters; and ſo it is termed in all our Statutes, and in all our Deeds relative to that buſineſs.—The Act 30th of the ſame Parliament of Queen Mary, '*anent* '*warning from redeemed lands*,' terms what has been ſince called *premoniſhing* the wadſetter, *the making lawful warning*.—This was done from the earlieſt periods, by granting *a written*

*power*,

*power*, *procuratory*, or *precept*, for that purpoſe; and the ſtyle of theſe, was, uniformly to *warn* and *charge* the wadſetters to come and receive their money. The ſame method was naturally adopted in the *warning of tenants*.—Accordingly we find, that the words *lawful warning and premonition* were ſynonimous, uſed equally in warnings and redemptions. Balf. p. 458. c. 11.

Theſe forms ſuggeſted alſo the 40 days; for, from the earlieſt periods, 40 days happened to be the ſpace fixed upon by our anceſtors for *premonition*, and thence became a faſhionable notice in almoſt *all national buſineſs*.—So early as Robert the firſt, goods pointed could not be ſold for 40 days after the ſeiſure.—Summonſes in James I.'s time, were appointed to be raiſed upon 40 days *warning* *. When idle people were taken up by the Sheriffs, they were allowed 40 days to find maſters; and when tenants wanted farms, practice pointed out the ſame ſpace †. The term of Whitſunday was alſo the cuſtomary term of removing, long before the Act 1555. A religious notion occaſioned the mention of this matter in our Statute-book, at a time when the civil importance of it drew no attention.—In the reign of James III. the poinding of goods for rents, and the

* 14th Parl. c. 62. 1457.

† This ſpace of 40 days appears common in the ancient cuſtoms both of Normandy and England.

the *incaſting* and *outcaſting* of tenants, are ordered to be deferred to the *third day* after the ſolemn feaſts of Whitſunday and Martinmas. Here we have the reaſon of the *two days* *, for which the Old Removings were delayed, as mentioned by Craig; together with evidence, that they were executed *both at Whitſunday and Martinmas.*—*Whitſunday* came afterwards to be the eſtabliſhed cuſtomary term for Removings all over Scotland. But, though Whitſunday was the uſual or accuſtomed term of removing, it had not then become a *legal term*, to which Landlords were obliged to pay reſpect in the matter of removing. The Act of James III. juſt mentioned, is a proof that this buſineſs had ſometimes been executed both at *Martinmas* and Whitſunday; and ſucceeding Statutes will diſcover *a large claſs of tenants*, who were ejected without the leaſt regard to any particular time of the year. When *liferenters* died, or lands fell in ward, the *ſuperior* and *fiars*, it ſeems, entered inſtantly upon the lands, and ejected the whole tenantry, whoſe tacks fell with the rights of their authors. But, by an Act of James IV. 1491 †, it is ſtatuted, 'That theſe 'tenants of lands fallen in ward, the tenants 'of Lady tercers and liferenters, alſo the te-



* The removing was executed upon the third day.

† Parl. 3. c. 26.

'nants under wadſets redeemed, or the poſſeſ-
'ſors of land any other way, happening to be
'altered, ſhall remain unremoved till the next
'term of Whitſunday following, *for payment of*
'*the former mails and duties.*'—And, in confor-
mity to this Act, another paſſed ſome little time
before the Act anent warnings †.—I have already
alluded to this Statute: it was intended for the
benefit of reverſers, who, having uſed the order
againſt their wadſetters, could not recover poſ-
ſeſſion of the lands. And it is provided, 'That
'the reverſers cauſe *lawful warning* to be made
'to the occupiers of the ground, *before ony Whit-*
'*ſunday term after the redemption.*'

The following deciſion is indeed compleat evidence, that the Judges had endeavoured to reduce Removings in general to due order, 20 years before the Act 1555; and that the rule at that time eſtabliſhed, was only ſanctified by the poſterior Act.—'*Tacita relocatio* is (ſays Balfour) 'gif the Lord of the ground make not
'warning to the tenant at the term of *Whit-*
'*ſunday*, albeit the tenant have na tack; and
'therefore, an tenant being in poſſeſſion as te-
'nant of ony lands *cloſit within terms*, and not
'lawfully warnit before the feaſt of Whitſun-
'day, may not be removit ay and while he be
'warned theirfra.' 3d Dec. 1534. Balf. p. 208.

From

† Parl. 6. cap. 30.

From theſe premiſes I conclude, 1*ſt*, That the Act 1555 did no more than add authority to known practices and cuſtoms. 2*dly*, That many Landlords paid no attention to theſe forms, neglected or diſdained to give their tenants notice of their intentions, and ſurpriſed the poor people by a *ſudden ejectment*.—Perhaps, indeed, the reſiſtance met with in many parts, might have been a motive with Landlords to conceal their intention, and thus take the tenants unprepared. The anxiety with which the ceremonies are here preſcribed, was in order to give certain notice of the Maſter's intentions,—to remove the poſſibility of the tenant's ignorance, and to give him a proper opportunity for providing for himſelf and family.—And, 3*tio*, That, for the public benefit, all removings in Scotland ſhould thenceforth take place at the *ſingle term of Whitſunday*, and ceaſe at all other times.

To return to the Statute—The Maſter having conducted himſelf as this law preſcribes, and thereby become entitled to the immediate aid of the civil power in removing his tenant, is diſcharged from all further 'laying forth of ſtreſſes and removings upon Wedneſday.'—Theſe words alluded to a cuſtom, which it ſeems prevailed, of forcing the tenant, by way of *diſtreſs*, to remove his property, *i. e.* putting

out and expoſing ſome part of it, capable of receiving damage.—*Diſtreſs* was the antient method of compelling tenants to do every part of their duty: and, in England, it continues to be the method at this moment.—Diſtreſs, you may remember, is different from poinding.—The one is a ſeiſure of a tenant's goods, in order to force him to make payment of the rent: the tenant is entitled to repledge, *i. e.* to get them back upon payment.—The other is a ſeiſure of the goods themſelves, *in payment*; and the execution is a diſcharge of the debt, to the extent of the poind.—The tenants were, it ſeems, forced, by *diſtreſs*, to remove from lands; and, for that purpoſe, a part, or the whole of their goods, were laid out upon a Wedneſday, *i. e.* the third day after Whitſunday.

—— 'And gif the partie warned in manner 'foreſaid removis not at the term, in that caſe, 'the warner ſall, incontinent, or ſo ſoon as 'pleaſes him, cum to the Lords of Council, or 'to the Sherrif of the ſhire, or uther Judges 'Ordinares havand juriſdiction, ſchawand his 'precept of warning ordourlie execute and 'indorſate; and ſall have letters or precept to 'charge the parties warned, and poſſeſſours 'of that ground, to compear before the ſaidis 'Lordis, Sherrifs, or their Deputes, or other 'Judges Ordinares foreſaidis havand juriſdic-

'tion,

' tion, upon ſix days warning or longer, at the
' will and deſire of the perſewar, to hear and
' ſee them decerned to remove, deſiſt, and ceaſe,
' conform to the precept of warning, and exe-
' cution thereof; or elſe, to ſchaw ane reaſon-
' able cauſe quhy they ſuld not do the ſamin;
' with certification to them and they failzie,
' that letters ſall be direct *ſimpliciter* upon them
' in the ſaid mater:—At the quhilk day, if they
' appear not, the Lords, Sherrifs, or other
' Judges Ordinar havand juriſdiction, ſall de-
' cern them to remove, deſiſt, and ceaſe fra the
' lands; and, gif they compear and inſtantlie
' ſchaw ſufficient title to bruike the lands, in
' that caſe the ſamin Judge to proceed and do
' juſtice as accordis of the law: and gif the
' partie compeareth and ſhawis na thing, bot
' makis alleageance, and offers him to improve
' the indorſation, in that caſe he ſall not be
' heard in judgment; bot gif he find ſufficient
' caution to the warner then inſtantlie, that
' gif his alleageance, being foundin relevant, be
' not ſufficientlie verified and prooven by him,
' that the profites, damage and intereſt quhilkis
' the ſaid warner, or ony uthers havand intereſt,
' hes ſuſteened, or ſall happen to ſuſteen be the
' delay of the foreſaid alleageance, be refound-
' ed to him: And to the effect that this ordour
' may have ſufficient proceſs in all times to
' cum,

'cum, it is adviſed, ſtatute and ordained, That 'all Sherrifs, and other Judges Ordinar, havand 'juriſdiction as ſaid is, be their ſelves, or their 'ſufficient Deputes, be reddie to ſitt, be fenſed 'courtes, all the lauchfull fifteen days after im-'mediately the feaſt of Trinity Sunday, for do-'ing juſtice in the ſaid cauſes, in manner above 'ſpecified: And gif the Sherriffes or Judges 'Ordinares havand juriſdiction in maner fore-'ſaid, and their Deputes, failzies to be reddie in 'granting of precepts, and doing of juſtice for 'obſerving of this ordour; in that caſe, they ſall 'pay to the partie, their haill damage, intereſt, 'and expences; but prejudice of the action 'againſt the violent occupyars and poſſeſſoures 'foreſaidis.

'And als, That na advocation of cauſes be 'taken be the Lords fra the Judge Ordinar, 'except it be for deedlie feede, or the Sherriffe 'Principal, or the Judge Ordinar be partie, or 'the cauſes of the Lords of Council, and their 'Advocates, Scribes, and Members.'

Sufficient proviſion being thus made, to procure notice to the tenant that he ſhall only be removed at a proper time of the year, the Act proceeds to ſecure the *public peace*, by diſarming the parties, and transferring the whole buſineſs to the Civil Power.

The

The proprietor, if obedience be refuſed to his own precept, is entitled to have another from the Lords, or from the Sheriff.—The firſt is here termed *Letters* of Summons, and the ſecond *Precept*.—The only difference between theſe and common ſummonſes is, that the former calls the party upon *ſix days*, in place of the ordinary diet; and continues to be thence termed a *Privileged Summons*. It may be raiſed upon any other days the purſuer pleaſes, *exceeding ſix*.—The writs to be libelled on, are, the *titles* of the purſuer, the *precept of warning*, and *executions*.—The concluſion muſt be *in terminis* of the precept; ſo that unleſs they happened to be properly drawn and executed, no removing could proceed.

Upon compearance of the party defender, he is to be heard upon all his defences, and only bound to find caution in the event of putting the cauſe upon *improving*, *i. e.* ſhewing the execution to be *falſe*. In reſting the defence upon this point, the defender gives up all pretence to any *right* in the poſſeſſion, and ſtands only on the ceremonies of the Act. As the preſumption lies for the truth of the execution, he is appointed to *find caution* for the profits, damages, and intereſt to be ſuffered by delay. Theſe have ever been the penalties conſequent upon diſſeiſine or forcible poſſeſſion.—'If the Aſſiſe '(ſays the *Quon. Attach.**) deliver for the com-

'plainer,

* Page 89.

'plainer, the damages and ſcaith which he ſu-
'ſtained, ſhall be modified by his own aith.'
The poſſeſſions againſt this Act are termed *violent occupations*, and the damages have always been called *violent profits*; importing, not what were really got from the land, but what might have been got *by it*. The objections being repelled, the tenant is to be put out in virtue of Letters of Ejection, either from the Lords, or the the Sheriff, as directed by the old Act of James the Second, formerly noticed. To expedite the buſineſs, a particular diet is appointed to be held by the Judges Ordinary.—*They* are rendered anſwerable to the private parties for their conduct, and advocations from them diſcharged to be received.

'All theſe things were ordered, that *force*
'(ſays Craig*) might thenceforth be prevented.
'By this Act, tranquillity was reſtored in an
'affair which ſeldom took place but with noiſe,
'crouds, and diſturbances.—The whole mat-
'ter was transferred to the Ordinary Judges,
'who, after deliberating and hearing of the
'parties, decreed according to equity and ju-
'ſtice.

'No action (continues he) is with us more
'frequent, or more keenly debated. Much is
'alwiſe to be ſaid on either ſide. The Land-
'lord

* Page 269.

'lord contends, that he may be at liberty to uſe 'his lands *at pleaſure*. The tenant ſtruggles to 'retain poſſeſſion of a native ſpot, which he 'himſelf has enjoyed from infancy, and where 'his hoary anceſtors lived and died.'

Lord Stair, and poſterior Writers, have denominated the Act 1555, an *excellent law*.—Tho' Sir George M'Kenzie profeſſedly wrote Obſervations upon our Statutes, he has not deigned to ſay any thing of this very intereſting law: he only repeats a few circumſtances from *Craig*; and adds two or three points of Practice, fixed by poſterior deciſions of the Court. One of theſe propoſitions is in the following words.—'Becauſe this Act ordains all warnings to be 'made forty days before Whitſunday, and 'ſpeaks not of another term, therefore the 'warning muſt be made *before Whitſunday*, tho' 'the perſon warned be not obliged to remove 'by his tack till the Martinmas; but execution 'muſt be ſuſpended till then.'—In ſupport of this, three deciſions are quoted. Lord *Stair*, *Bankton*, and *Mr Erſkine*, have repeated the ſame rule: And it has long been an eſtabliſhed point in Practice, That where a tenant's leaſe expires at Martinmas or Candlemas, the precept of warning charges him to remove at thoſe terms, but muſt be executed 40 days anterior to the *Whitſunday preceding*.

The learned, the ingenious, and animated Author of the Law Tracts, to whom in the courſe of theſe Lectures I have been ſo often indebted, has not judged this Statute below his notice.—An analyſis of it, makes the 34th article of his *Elucidations;* and the ſcope of it is, to reverſe the received propoſition, and to eſtabliſh, from the *tenor of this Act itſelf*, That a tenant may, in virtue thereof, be warned 40 *days preceding any other term*, whether of Martinmas or Candlemas, at which the leaſe expires.—Venerating, as I do, the abilities of this reſpectable Author, it is with reluctance I find myſelf obliged to differ from him moſt materially in the conſtruction of this important Statute. But, animated by a deſire to purſue the ſame method of inveſtigation, which his example has ſo ably taught, of founding Law on the baſis of Hiſtory, and thus aſcending to the Principles of our ancient Statutes and Practices; the method of ſtudy which I have propoſed to myſelf, has led me at times into an involuntary difference of opinion.—I have preſumed, on this occaſion, to diſſent, not only from his Lordſhip's interpretation of this Statute, but from the conſtruction put on it by Sir George M'Kenzie and Lord Stair, or rather by the Court of Seſſion, upon whoſe deciſions the opinion given by thoſe eminent Lawyers is founded.

From

From the preceding deduction, and in ſupport of what I have advanced, I am now to maintain, *firſt*, againſt the opinion of Lord Kaims, That the Legiſlature of Scotland, by the Act 1555, intended to put an end to all warnings and removings, except *at the term of Whitſunday allenarly*.—And, *ſecondly*, againſt the authority of the deciſions founded on by Lord Stair and Sir George M'Kenzie, That, at whatever term or time of the year a written leaſe expires, the tenant, by the ſame Statute, ought not to be warned or removed till the Whitſunday following ſuch expiration; and, conſequently, that theſe deciſions were deviations from the Statute.

The queſtion turns not upon *expediency*, or *poſſible improvements*: it regards the *juſt interpretation* of this act at the time it was made, and which, according to Lord Kaims, has been miſtaken by all our Writers.—I agree, that it has been *miſtaken*; and I am to ſhow, that his Lordſhip's late idea, however reaſonable in the abſtract, *widens the miſtake*.

The 34th article of the Elucidations ſets out with informing us, That, as far back as can be traced, *Martinmas* appears to have been the term of entry and removing of tenants.

The Act 1469, diſcharging poinding and outputting of tenants upon the holidays of

Whitſunday and Martinmas, proves, that entries and removings were common upon both theſe terms, *at that period.* But (continues the ingenious Commentator) 'In the 16th century, 'and perhaps earlier, *Whitſunday* had become 'the term of removing.'—True, it was the cuſtomary, but it had not become the legal eſtabliſhed term; and I have already mentioned a very numerous claſs of tenants, *viz.* thoſe of life-renters deceaſt, thoſe who held lands redeemed from wadſetters fallen in ward, tranſmitted by gift, ſale, or other change, who had been accuſtomed to be removed or ejected immediately after the falling of their authors rights, and who, by ſpecial Acts of Parliament (one of them in the very ſame Seſſion with the Act 1555) were all protected in their poſſeſſion till the Whitſunday enſuing.

Now, there were only three other kinds of tenants, whoſe removings remained to be regulated, *viz.* tenants by written leaſes—tenants by tacit relocation—and tenants poſſeſſing precarioufly, or at the will of their maſters.—As to the *firſt* of theſe, holding by leaſes, I ſhall ſpeak to them afterwards.—From the deciſion before quoted, in 1534, it appears that the Courts of Law had already refuſed to allow the *ſecond* claſs to be removed, but at the term of Whitſunday, and after lawful warning.—In another

place,

place, we are told alſo by Balfour *, That ‘ *Tacita relocatio* endures ay and while lawful ‘ warning be made to the poſſeſſor, being in ‘ poſſeſſion before *by virtue of an title.*’ 20th February 1552.

But the precarious poſſeſſor, or the tenant, who *had no title* beſides the tollerance or will of his maſter, might be, and no doubt was, ejected at pleaſure, without regard to any term, or to any proper notice.—‘ Qui precario poſſidet, ‘ (ſays Craig) non expectato Pentecoſtes tempore aut denunciationis, quandocunque volet ‘ dominus, migrare cogetur ; ita tamen ut aliquis æquitati locus ſit.’——So ſtood the Law of England, with regard to tenants-*at-will*, at the period we are talking of ; and ſo we ſhall afterwards find it continues to this day, under certain modifications introduced by the Courts of Juſtice.

If, then, ſuch a numerous claſs of tenants had, by a ſeries of prior connected Statutes, been poſitively ſecured againſt removing *at any other term* but Whitſunday, without regard to the period of the termination either of their own or their authors rights—If the Courts of Juſtice had beſtowed the ſame privilege upon theſe poſſeſſing by *tacit relocation*—Was it not natural, was it not expedient, to put all tenants upon the

* Page 209.

the ſame footing.——This was the very purpoſe of the Act 1555. The words, accordingly, are as expreſs as words can be: 'It is ſtatu-'ted and ordained, That, in *all times coming*, 'the warning of *all tenants and others* ſhall be 'in this manner, *&c. &c.*' And an extraordinary diet of the Inferior Courts, is appointed to be held for fifteen days after Trinity-Sunday, '*in all times to come.*'

'The time of warning (ſays Lord Kaims) 'is not regulated by the Statute, except where 'the removing *is at Whitſunday*.—There is no-'thing ſaid in the Act, that the warning *muſt* '*be* 40 *days* before Whitſunday, whatever *be the* '*term of removing*.'——What could the Legiſlature do more than to ordain, that *all* warnings ſhould precede Whitſunday, in *all time thereafter?* Is not that an expreſs declaration, that, let tenants in Scotland enter as they might, they ſhould only be warned, and conſequently removed at or after Whitſunday?—I have juſt ſhewn, that, independent of this Act, the greateſt part of the tenantry ſtood in that very predicament, That a tenant-at-will, or without leaſe, had properly no term, but the pleaſure of his Maſter.—Admitting it, however, to be otherways, and that the time of the entry were to regulate that of the removing, it may be aſked, If the Act 1555, ſo requiſite to the

peace

peace of all Scotland, might be eluded, by making conventional terms in verbal leaſes, different from that Act? — Were tenants, entering at Martinmas, or Candlemas, or May-day, to have no warning; but to be ejected *brevi manu*, in the old way?

Lord Kaims proceeds — 'We are not left to 'an argument from analogy.'—Balfour reports a caſe, *Lord Borthwick* contra *Syme*, in the following words: 'In actions of removing of 'tenants, the warning is not ſufficient, except 'there be forty free days between the warning 'and the term of Whitſunday or Martinmas, 'excluding not only the days of warning, but 'alſo the days of Whitſunday or Martinmas. 'In this caſe, but ten years after the Statute, 'we have the greateſt Lawyer of his time lay-'ing it down as a rule, That warning muſt be 'forty days before the term, *whether Whitſun-'day or Martinmas*. That learned Author could 'not miſtake the meaning of a Statute, which 'probably was framed by himſelf, undoubt-'edly with his concurrence.'

Now, if this deciſion be really upon my ſide of the queſtion, the arguments from analogy muſt diſappear.

To bring it upon my ſide, I muſt ſupply a few words, which have been omitted by his Lordſhip in the quotation, *as of no importance*.—

Thus

Thus it ſtands in Balfour: 'In actions of re-
'moving of tenants, *and of redemption of lands*,
'the warning is not ſufficient, *&c.*'—As Whit-ſunday was the ordinary term for *removing*, ſo Martinmas had been the moſt uſual term *for redemption of lands*. The queſtion, here, turned upon the *forty days* in the reverſion, and the forty days allowed by the Act in the *poſterior removing*. The Act of Mary, c. 30. concerning redemptions, and which immediately preceded the other about tenants, appoints lawful warning to be made previouſly to the redemption, *conform to the reverſion;* and lawful warning to be again made to remove, before *ony Whitſunday after the term*.—Lord Borthwick, the reverſer, had not given 40 free days, either in the one or the other warning; and the Lords found, That that ſpace ought to have been given in both caſes, excluſive *of the term-days*.—The deciſion, therefore, tends to eſtabliſh the direct reverſe of the propoſition for which it is adduced. It proves, That the then late Statute concerning redemptions, was cloſely *adhered to;* and that, without reſpect to the date of ſuch redemption, the wadſetter could not be warned or removed till Whit-ſunday following; which, in effect, was giving him an additional year's poſſeſſion of the arable lands.——If people, after this public law, did not conform to it, by making the term of conventional

ventional removals *at Whitſunday*, they knew the conſequence. The Agreement kept the tenant in till *Martinmas* or *Candlemas*, and the Law kept him till the Whitſunday following.—Such was the caſe with all the tenantry by verbal tacks.

TENANTS holding by *written leaſes*, ſtood upon a different and peculiar footing, *completely excluſive* of the new idea here combated.—By the Common Law of Scotland at that time, a tackſman could neither be *warned*, nor purſued to remove, during *the exiſtence of his leaſe*. His knowledge of his own term, was held to be warning ſufficient; and, till that expired, the Maſter had no right to make a ſingle movement in the buſineſs: So ſoon as it was expired, he might have entered, and ejected him. This doctrine wears a novel appearance, merely becauſe it has been long forgot.—It is, in fact, a remainder of the moſt antient Common Law; and it continues to be the Law of England at this moment. Here is authority not to be conteſted,—'Gif ony man (ſays Balfour) be 'perſeud for removing fra lands, it is ſuffi-'cient for him to allege and prove, that he had 'tacks to rin *the time of the warning*, ſuppoſe 'the ſamen tacks be expirit and outrun during 'intenting of the action.'—28th June 1553.

*Abercromby* contra *Ardroſs*.—This was two years before the Statute 1555.

Another deciſion, to the ſame purpoſe, is given, 19th Dec. 1569, *Lord Roſs* contra *Livingſtone*, *i. e.* 14 years after it.—To the ſame rule of Common Law, Craig ſubſcribes, at many years diſtance*: 'In his rentalibus ſeu aſſedationi-'bus, *ſufficit*, ſi tempore in *quo denunciatio eſt* '*facta*, colonus *tempus aliquod* ex ſua aſſeda-'tione reliquum decurrendum habet, licet tem-'poris, vel actionis, vel ſententiæ, omnino tem-'pus decurſum fuerit.'

Tenants by leaſe, were, by the Statute, put on the ſame footing with all other tenants. The latter could not be warned, ſo long as the rights of their authors ſubſiſted; and they could not be removed till the Whitſunday after theſe rights *fell*, at whatever term that happened.—Tenants by leaſe could not be warned *by Common Law*, while a day of their term remained to run; and the Act 1555 protected them from removing till the Whitſunday following, without *any regard to the date of ſuch expiration.*

Thus was our Statute Law regarding the removing of tenants, conſiſtent and compleat, comprehending the whole tenantry of Scotland.

The only objection ocurring to the interpretation of the Statute, which I have thus ventured

* Page 281. cap. 12.

ed to give, ariſes from an apparent inequality which it ſeems to eſtabliſh between the maſter and the tenant.—The latter might, in ſome caſes, have continued a year after the expiration of his leaſe; the former, from any thing that has been ſaid, could not inſiſt upon it.—In England (as all the Lawyers tell us) every thing was reciprocal; the Maſter and the leſſee ſtood equally bound to each other. The Act 1555 had ſolely in view the protection of the tenants; it provides nothing in favour of the Landlords: And our Statute Laws never preſume, that a Scottiſh tenant is willing to quit his poſſeſſion; — not that farms in this country were more profitable than thoſe of the neighbouring kingdom; but the Legiſlature, from certain experience, truſted to that remarkable attachment of our country-people to the ſpot of their reſidence.

But, though the Statutes are ſilent upon this circumſtance, it was ſufficiently provided for by the Common Law: 'Quoties alterutri parti 'ſays Craig) ſive colono ſive domino placuerit, 'ut coloni ſedes mutetur, debet is qui ita in 'animum induxerit, alteri denunciare; nempe, 'ſi inquilinus aut colonus alio ſedem tranſ- 'ferre intendet, is domino *denunciabit*, ſe præ- 'dium quod a domino habet, ſive illud ſit ru- 'ſticum ſive urbanum, illi renunciare, quod 'quadraginta dies integras ante feriam Pente-

'coſtes faciat, ut dominus interea de novo 'colono ſibi provideat.'—Tacit relocation only took place where no warning was given on either ſide: 'Si nulla ab alterutra parte fiat 'denunciatio*.' — And, therefore, if the tenant by leaſe choſe to remove at the iſh, without taking advantage of the Statute, he was obliged, by the Law, to give notice to his Maſter 40 days before the term.

Mr Erſkine (p. 270.) has totally miſtaken this circumſtance.—'The tenant's renunciation '(ſays he) in the opinion of Craig, is to be 'ſigned and delivered to the Landlord forty 'days before the Whitſunday at or immediately preceding the iſh; and to bear a con-'ſent, That the Landlord may, at the iſh, enter 'into the poſſeſſion *brevi manu*.' And he refers to Dieg. 9. § 2.

I have quoted the paſſage:—Not one ſingle word of this is to be found in it. Craig ſays no more, than that the tenant muſt, 40 days before the term, give warning to his Maſter, that he renounces, or intends to renounce his poſſeſſion; and, in § 3. he takes notice that this muſt be done *in writing*.—It is not Craig, but Lord Stair, who expreſſes himſelf in the terms mentioned by Mr Erſkine. 'Tacks (we are told 'by his Lordſhip, p. 331.) ceaſe by the expiry of 'the

* Page 10.

' the terms thereof, or the tenant's renunciation,
' the form whereof is—The tenant, 40 days
' before Whitſunday, ſubſcribes and delivers to
' his Maſter, a renunciation of his poſſeſſion,
' conſenting that he enter *brevi manu*; where-
' upon there muſt be taken an inſtrument of
' renunciation in the hands of a Notary*.'—In-ſtead of a warning that he was to give up the poſſeſſion, which was the method in Craig's time †, the delivery of a deed of renunciation, *ob majorem cautelam*, came afterwards into practice; and the inſtrument afforded proof of the Maſter's acceptance, in caſe there was no tack, or if that tack was expired; *i. e.* It prevented tacit relocation from taking place againſt the tenant.—The old warning or notice ſeems to have been more conſonant to principle, than the poſterior deed of renunciation; for, there was nothing in the tenant's perſon to renounce. He held, indeed, the poſſeſſion: but, if he either had no tack, or if that tack was about to expire, he had no right to it; and therefore, a declaration of his intention to give up the poſſeſſion when the term arrived, was as good as a warning by the Maſter, that it was to be taken from him. —At the ſame time, the reaſon of all this is plain, from the conſtruction I have put upon the

* *Vide* the old form in Appendix, N° 1.

† Sive dominus denunciaverit, ſive colonus ſe migraturum declaraverit, p. 86. cap. 4.

the Statute. If it was a verbal leaſe, the Maſter could not remove the tenant, for want of a warning at his own inſtance; and if it was a written one, he neither could have warned or removed him at the enſuing term, without his own conſent. —To make ſure work, therefore, he took a formal deed of renunciation, 40 days before the expiration of the tack.

By the eſtabliſhment of one term in the year, and *one only*, for removing, Whitſunday was rendered the general market-time of farms. All the *ſetters*, and all the *takers*, were put together at one time: which ſerved to maintain a juſt equality between the parties; for, the true value of any thing is always beſt eſtabliſhed when buyers and ſellers are moſt numerous.

Lord Kaims ſays, 'That our authors have 'given us no information about the cauſe of 'the preference of this term upon the occa'ſion.'—'Whitſunday (ſays Lord Stair) is the 'competent term for taking lands, and provid'ing fuel, which is ordinarily peats, to be caſt 'and win about that time *.'—I cannot help being ſatisfied with this reaſon. The tenant entering at Whitſunday, gets immediate graſs for his cattle, juſt when his Winter proviſion is conſumed: the fuel, at the ſame time, is exhauſted in his old poſſeſſion. The Summer enables him to lay in a new ſtock of both.

Beſides,

* Page 643. cap. 7.

Beſides, corn-farms were formerly, and generally ſtill are, let for ſo many *years* and *crops*: The tenants remove only from the houſes and graſs at Whitſunday; the corn continues to be their property. At Martinmas, the new tenant's barns remain empty, and the old one generally gets the advantage of them for managing and ſtoring the crop which belongs to him.—This civility and mutual accommodation had become common even in Craig's time.—After deſcribing the voluntary removing I have mentioned, he adds, 'Scio tamen hoc tenentibus indulgeri *pleriſque locis*, poſtquam ſata ſive ſegetes a ſolo ſeparaverint, ut eas in loca priora, ubi ſolitæ erant antea ſervari, congerant; ſed hoc potius *ex gratia* concedi puto, quam ex juris rigore.'

No other term of the year is attended with ſuch plain advantages; and therefore, the wiſdom of our anceſtors, in fixing upon Whitſunday for the buſineſs of warning and removing, muſt, according to my humble apprehenſion, ſtand unimpeached.

Having thus, with a diffidence only to be felt, offered a new analyſis of this Statute, or rather attempted to reſtore its original meaning, I go on to examine our *preſent practice*, which, tho' not ſo wide a ſtretch as that which has been ſpoke to, is ſtill *a deviation* of great importance.

FROM the tract of decisions posterior to the 1555, it is evident that all persons conformed to the term thereby prescribed; so that the original purview of the Statute came to be forgot. —At last, about 50 years afterwards, the Landlord, in a lease, which, for some particular reason, had been made to expire in September, warned the tenant to remove 40 days before the preceding Whitsunday; and, after that term, he sued the tacksman to remove at the expiration of the lease in September.—The Counsel for the tenant pleaded, 'That neither the warning, 'nor the action, could be sustained, being made 'before the term of the expiring tack; *before the 'expiring whereof*, he could not be *warned*, far 'less could action of removing have been in-'tented against him, until the tack *had been 'ended*.' — 'The Lords sustained the warning 'made before the ish of the tack, to the effect, 'that, after the ish, he might seek his remov-'ing, and pursue the same.' — The *ratio* given by the Court is this: 'If warning should not 'be made till the Whitsunday following after 'the tack, the defender might bruick the lands 'a year longer than he had right, for the old 'tack-duty, *which were unequitable*.' Durie, 8th July 1626. *Foulis*.

This is the decision upon which the opinion of Sir George M'Kenzie is rested, and by which our Practice has ever since been regulated.

As

As the Law then ſtood, it appears to have been an erroneous deciſion. — The tenant's defence was a *good one*, founded both upon the Common and Statute Law of the kingdom. In place of attending to what the Act of Parliament *had ordained*, the Court ſet the Common Law entirely aſide, and fixed their attention upon what, in their opinion, the Statute *ought to have been.*

If the Law of the land gave the tackſman another year's poſſeſſion, Was it equity to take it from him? What right in equity had wadſetters, and the other claſs of tenants I have mentioned, to a year's poſſeſſion at the old rates, after their *titles were no more*, eſpecially when theſe rates were often ſmall in proportion to the value of the lands? and yet they could not then, and cannot now, be deprived of this advantage. Reverſers, Fiars, *&c. &c.* cannot prevent this advantage from being taken of themſelves. Do what they will, the poſſeſſion of liferenters, wadſetters, *&c.* will, in moſt caſes, outlive the title of their Authors for a year; whereas Landlords, knowing the effect of the Statute, could, at any time thereafter, ſhorten their term, *i. e.* let only for 19 years, where 20 were intended *,



* Though this is not the *original reaſon* of nineteen years being the common ſpace in tacks, it was probably the reaſon of its being continued in practice.

or make their account with what was to happen from the beginning of their bargain. Thus, for the ſake of that equity which they did not reach, the Judges broke the uniformity of the terms eſtabliſhed by the Act 1555, and, ſapping the well-conſtructed fabric of an Act of Parliament, gave riſe to a number of difficulties, which have ſince perplexed this branch of buſineſs.

Practitioners were not long of taking the hint thus given them: they altered their precepts, and charged the tenants to remove at *Martinmas* or *Candlemas* expreſsly, and executed them 40 days before Whitſunday preceding *. The Common Law was again opponed in vain, and the diligence ſuſtained, *Inglis* againſt *tenants*, 16th December 1628, *Durie*. And this deciſion fixed the opinion of our Lawyers, and has directed our Practice in this circumſtance ever ſince.—Encouraged by theſe determinations, a party, ſome time after, tried a warning directly before Candlemas; but this attempt was defeated, 15th June 1631, *Ramſay* againſt *Weir*.

Lord Kaims, in conſequence of his argument, is obliged to declare, That Sir George M'Kenzie, Lord Stair, *&c.* have made a raſh inference from thoſe judgments; and that the opinion common

* Sometimes the precepts warned the tenants to remove at Whitſunday, *at leaſt* at the real term of expiration.

common in all our Law-books upon this matter, has no ſupport from theſe deciſions. — 'Two of them (ſays his Lordſhip *) are not to 'the purpoſe, and the laſt is a lame authority.

'The objection made to the warning in the 'firſt, was *childiſh*, when the very purpoſe of 'a warning is to notify to the tenant that he 'was to remove at Whitſunday †. And the 'Court, in place of finding, did not even inſi-'nuate that it was their opinion, that warning 'muſt be before Whitſunday, when the remov-'ing is at Martinmas, or any other term.'—But I have already ſhown, that the objection was not the *conceit of a Lawyer*; — it was the Common Law of Scotland, which had ſubſiſted for ages, and ſtood declared to be ſo by Balfour and Craig.

As to the deciſions, I cannot conceive any thing of the kind to be more directly in point. Let the firſt ſuffice as an example ‡.—The tack expired in September: the Maſter warned before the Whitſunday *preceding*, and brought his action againſt the tenant, to remove at the expiration. The Lords ſuſtained the warning, tho' anterior to the iſh, and for this expreſs reaſon, That 'if the warning ſhould not be made be-'fore the Whitſunday following, *the tenant* '*might brook a year longer than he had right.*' Now, this deciſion is dated 8th July: And, if



* Page 287. † 1626, Foulis. ‡ Durie, p. 211.

the Lords had not been *determinately of opinion*, that warnings ought to precede the term of Whitſunday, without regard to all other conventional terms, they would never have ſuſtained this abſurd warning*;—they would have recommended to the purſuer to execute another warning, for which there was abundance of time *between the 8th of July and September*, when the tack in queſtion expired. But, according to the *ratio* of the deciſion, the warning *already made* muſt have been ſuſtained; becauſe no other could be executed till the Whitſunday following, which would *have deprived the Landlord of a year's poſſeſſion of his farm.* — In this ſenſe Lord Kaims formerly underſtood it; for, thus the deciſion ſtands abridged in the Dictionary: 'At whatever term the tack runs out, 'warning muſt be made forty days before the 'preceding term of Whitſunday.' — Hence I venture to conclude, That the opinion of Mac-Kenzie, Stair, M'Dougal, and Erſkine, is *juſt*, and not erroneous, ſince it is founded upon theſe deciſions.—The error lies in the deciſions themſelves.

The learned Elucidator diſcerns great inconveniency in this part of our Practice.— 'A 'warning

* The warning had been made to remove at the Whitſunday, though the tack did not expire till September:—The effect was propoſed to be ſuſpended till that time.

' warning (ſays he) ſeven or eight months be-
' fore the term, is no indication of what the
' Landlord's mind will be when the term ap-
' proaches; and, hoping a change of mind,
' the tenant forbears to ſeek for another farm.
' Much experience has taught us, that 40 days
' is a proper ſpace; and there is no proſpect,
' that, in ſo ſhort a time, the Landlord will
' change his mind.'

To this notion I cannot help refuſing aſſent; and I refuſe it with a degree of confidence, becauſe it will be found diametrically oppoſite to the wiſdom of our Legiſlature, and I am certain it does not quadrate with the experience I have had from practice and obſervation. All the Acts of Parliament I have ſpoken to, point at the warning of *a year*; and the laſt one, 1555, recommends it ' ony time within the year, 40 ' days before the term.'—If we admit the obſervation to be true, What is to be ſaid of the Act 1579, which preſerves a ſimple warning for *three years?* or of the Act 1669, which refuſes to cut off a mere ſummons of removing in leſs than *ten years?*—Parliament muſt have been wonderfully miſtaken in its ideas of this matter; and time, in place of curing, muſt have magnified the error.

Thoſe who have ſeen tenants *ſuddenly warned* from dwellings, to which long poſſeſſion had riveted

riveted their affection—who have heard their ſimple feelings burſt out in expreſſions of nature, will never believe that they forget, or become indifferent to a charge of that kind—

'En queis conſevimus agros!' *Virg.*

When the Maſter is reſolved, the ſooner he gives notice to his tenants, ſo much the better. They have then time to look around, and are not driven to accept of any conditions, or of any farms, from the ſhortneſs of the time.—What would be the condition of huſbandmen in this country, if their Maſters were to give them no other warning, but the old 40 days of Law?—No man, as matters are now managed, warns his tenants, before he has agreed with others to ſucceed them. If he continues ſilent till the exact 40 days, what chance have the outgoing tenants to get other farms, when perhaps every inch of land all around them is already agreed for?—By this very circumſtance, numbers of induſtrious families have been reduced to miſery. The late faſhion of extenſive farms, graſs grounds, &c. &c. often leaves nothing in the market. A tenant by leaſe, indeed, is not in ſo much danger. He knows the term, and generally provides for it; but it is a hardſhip to which all others are expoſed, and from which I hope Humanity will protect them, ſince the Law does not.

If

If I have had the misfortune to differ from the learned Elucidator, upon every circumſtance of the ſubject before us, let it not be imputed to a vain affectation of indulging ſingular opinions. No more has been attempted, than to defend the antient law.—I have had the great advantage of being guided by his judgment and knowledge, thro' many intricate parts of my preſent laborious undertaking; and I am always happy to glean materials under the flambeau of his genius.

HAVING, then, given my reaſons at large for preſuming to teach any thing different from ſo great a man, I return to my hiſtorical account of this ſubject, which ſtopt at the Court of Seſſion authoriſing warnings made againſt tenants, whoſe tacks expired at Martinmas, or other terms, to remove at the expiration of theſe terms, in place of the Whitſunday following, which I have ſhown to be the genuine purport of the Act.

At the time of the deciſions we have mentioned, and during the greateſt part of the 17th century, a remainder of the old law ſubſiſted.—No proceſs for removing could be ſuſtained *until the term arrived*, and the tenant actually refuſed to remove. The Act 1555 does not appoint a Court of Removing to be held till after Trinity-Sunday, at Whitſunday yearly.—So long

long as the Sheriffs, and other inferior judges, did their duty at this Court, no inconvenience could be felt, but what was unavoidable in the buſineſs. This, however, appears in many places to have been neglected; which forced proprietors to bring their actions before the Court of Seſſion, and then a very great evil no doubt diſcloſed itſelf.—The ſummons was to be raiſed, and every thing to be done, *after the term:* —the incoming tenant was diſappointed—a greater evil, in Lord Kaims's opinion, than any that was remedied by the Act 1555.

Had the miſchief been either great or general, it would have been ſooner remedied; but we hear little of it till Nov. 1671 *, when a proceſs happened to be raiſed before the term, againſt the poſſeſſor (not of a farm, but) of a ſoap-work. The defender ſtated the objection upon the Act 1555. The anſwer was, 'That 'the Act related not to *prædia urbana*;' which the Lords ſuſtained.—This is the deciſion upon which Lord Stair grounds his opinion, that actions of removing may be raiſed *before the term*. It is repeated by Mr Erſkine; and, though plainly not to the purpoſe, as reported by Lord Stair himſelf, it is the foundation of our preſent practice of raiſing actions of removing againſt tenants, long before the expiration of their leaſes,

* Riddell.

leaſes, and obtaining decreets ready for execution at the term, which, as a method of much expediency, is now finally eſtabliſhed.—No other inſtance occurred till about ten years afterwards, when a Decreet of Removing in a rural tenement, pronounced before the term, was ſuſtained. June 16th, *Lady Chatto* contra *tenants*.—Fountainhall ſays, that ſome of the Judges heſitated upon this deciſion. 'Tenants '(they obſerved) were favourable in Law (as 'appears by many of our Acts of Parliament) 'and were not to be ſo ſtrictly uſed; and that 'the anticipation was contrary to the analogy 'of the Law.'

Lord Kaims informs us, that the Commiſſioners appointed by Oliver Cromwel, were the firſt who thought of a remedy to this evil.—'They allowed Summons of Removing, before 'the Supreme Judges, to be raiſed at any time 'after the warning, to be executed on 21 days, 'providing the day of compearance be ſix days 'after the term.'

This was an alteration made with great deference to the Common and Statute Law of the country; for, no man could be brought, by the Statute 1555, ſooner into Court, than *ſix days after the term*.—Struck by this circumſtance, Lord Kaims obſerves, 'That it was but half a 'remedy, or rather no remedy at all.'—If I am

not much miſtaken, it was an evil of a different nature, which the Commiſſioners meant to remedy. Oliver's people were not apt to give orders without *meaning*, or to act without *effect*. Sheriffs had become negligent, and parties choſe to bring their Actions of Removing before the Supreme Court: but Precepts of Warning, and Executions, were to be tranſmitted to Edinburgh; and the Summons was to be raiſed and executed in the country, and returned, *all after the term*—a circumſtance which muſt have conſumed time, in proportion to the diſtance of the place, and difficulty of communication. No more was intended by this order, than to put it in the power of parties to have every thing as ready before the Superior Court at Edinburgh, *upon the day of compearance*, as they could have had before the Sheriff in the country.—In this view, the order is ſenſible and uſeful: in any other, it is *not ſo*.—When the Court of Seſſion was reſtored, the inconvenience returned with double force. The Court did not ſit till June. Hear what Lord Stair propoſes: —

'Albeit Removings be in the roll of cauſes that 'are ſummarily diſcuſſed, yet, the term falling 'in the *vacance*, this great inconvenience fol-'lows, that the warning cannot be made ef-'fectual *at the term;* and therefore, warning 'may be made in the beginning of January,

'that

'that the removing may be diſcuſſed before 'the end of February *.'

Religion, as you have heard, occaſioned the firſt ſtatutory notice of the matter of removing in the reign of James II.; ſo now, in the 1644, the reign of the Preſbyterians, the ſame principle gave riſe to another regulation.—The keeping of the Sabbath, as it is termed in a ſtrict Judaical acceptation, was the characteriſtic of the Preſbyterians of that time. The Act 1555 appointed warnings to be read in the church during the time of Divine Service, which it ſeems was often literally performed. This gave offence to the Saints of the 1644; and therefore, an Act of their Parliament paſſed †, diſcharging warnings, and other executions of the law, to be read, till the Miniſter had concluded the ſermon, and ſaid the bleſſing; and, ever ſince, they have been read at the church-door, as no body would ſtay in the church to hear them. Mr Erſkine, therefore, erroneouſly tells us, that this alteration of the Forms came in by *immemorial cuſtom.*

The term of *Whitſunday* being one of the moveable feaſts of the Church, varied every year in the circle of the Eccleſiaſtical Calendar. —This circumſtance, in the civil matter of removing, was attended with many inconveniences: it occaſioned miſtakes in the calculation



* Page 646. † Cap. 14.

of the forty days, and, consequently, a number of unnecessary disputes.—By encroaching too far upon the Summer, it gave improper advantages to the removing, or, as we say, the *outgoing tenants*.—These inconveniences were removed by Act 39. of the 2d Sess. 1st Parl. of William and Mary.

'Our Sovereign Lord and Lady, and the 'Estates of Parliament, considering the in-'conveniency arising from the uncertainty of 'the term of Whitsunday, whereby the en-'durance of the two ordinary terms of Whit-'sunday and Martinmas is so unequal, and 'Whitsunday oft-times reaching far in Sum-'mer, by the removing from lands at that 'time, these who remove do eat up and de-'stroy the meadows and hained ground: For 'remeid whereof, their Majesties, with consent 'of the said Estates of Parliament, do statute 'and ordain, That the Summer and Winter 'Terms shall, in all time coming, be the Fif-'teenth day of May, and Martinmas; and 'that the legal term of removing, both in burgh 'and land-ward, shall be the said Fifteenth day 'of May, upon warning Forty days preceding 'the same.'

This concludes our Statute Laws regarding the *Removal of Tenants*.

WE

WE now come to conſider the *Practical Order*, and the *Writings neceſſary in the buſineſs*.

THE *firſt* ſtep is, to prepare a *precept of warning*.—It is called a *precept*; becauſe, being directed to an inferior officer, that officer does not repreſent the perſon of the proprietor, but acts by his command. Precepts are iſſued only by thoſe who have the right in their perſons.

The right to remove the tenant is in the heretor, by his infeftments; and no title is preſumed in the tenant, to remain. The precept is an act of exerciſe of that juriſdiction inherent in the heretor; and therefore, the ſtyle imitates the letters of the *King and his Judges*.—For the proprietors of lands were Princes in their own territories; and each member imitated the manner and ſtyle of his Superior, from the loweſt rank of the feudal ſcale, to the Sovereign himſelf.

As St Martin has not thought this writ of conſequence enough to be admitted into his ſyſtem of Forms, I ſhall take it from Spottiſwood, p. 65.—the ſtyle being every-where the ſame*.

'A. heritable proprietor of the lands and
'others after deſcribed. To
'executor hereof.'

The

* *Vide* Appendix, No. 2.

The precepts of warning were always directed, and are yet directed, to the loweſt officer of the barony or other juriſdiction: and it might have been directed to any perſons; 'Quidlibet 'enim (ſays Craig) ad id munus ſufficit.'

'It is my will, and I require you.'

Here is the great ſtyle.—The King can only ſay, '*Our will is*, and We command you.'—It is theſe words that give the title to the writ. A Procurator, you may remember, is a repreſentative of his conſtituent:—he is *made* and *conſtituted*:—he acts in his name; it ſuppoſes ability for that purpoſe: and, though the Act of reſignation of lands be miniſterial, yet it would have been an inſult, had the vaſſal appointed a mean perſon to perform an act of reverence to his Superior. In giving ſaſine, the proprietor riſes in importance, and appears as a Superior himſelf. He gives, therefore, *a precept*, and *commands* his Bailie to execute the buſineſs.

'Ye paſs, *forty days* preceding the term of 'Whitſunday.'

One of the firſt queſtions moved upon the Statute 1555, regarded the forty days, *i. e.* whether they were free or not; and it was found that the warning is not lawful, unleſs there be forty *free days* betwixt the term of warning and the

the term of Whitſunday, excluding not only the day of warning, but alſo the term of Whitſunday itſelf. 19th May 1565, *Lord Borthwick**. In February 1715, the Lords diſpenſed with this rule, and decerned in a Removing, altho' the 40 days were not free—a deciſion which it is preſumed will not be repeated †.

In caſes where more than one term of entry is mentioned in the leaſe, ſuch as Candlemas for the graſs, and Whitſunday for the houſes, the precept muſt be executed 40 days before the Whitſunday preceding the firſt term ſo ſpecified. Feb. 14. 1765. *M'Naughton* contra *Wilſon*.

Tenants happening to be out of the kingdom, an objection was made, that 40 days warning were not in that caſe ſufficient—an erroneous idea, ariſing from the analogy of a ſummons. A warning is now nothing more than a notice or intimation requiſite to found a ſummons. A private perſon has no power to give notice at the market-croſs, pier and ſhore; and the Act 1555 gives him no ſuch authority: But the ſummons of removing conſequent upon the warning, muſt be upon the long *inducię*. The warning was, notwithſtanding, ſuſtained with ſome difficulty, needleſs doubts having been entertained by ſome of the Judges about it ‡.

It

* Balfour, p. 457. † *Ducheſs of Buccleugh* againſt *Davidſon*.
‡ Lord Stair, 10th Feb. 1666. *M'Braes* againſt *Creditors*.

It may be upon 60 days, in place of 40, for that can do no hurt.—Warnings have been objected to, and ſuſtained without proclamation at the market-croſs, pier and ſhore. 18th January 1612. *Archbiſhop of St Andrew's* againſt *Lord Roxburgh.*

To make ſure work, however; upon ſuch occaſions, practitioners applied the ordinary remedy, of *Letters in ſupplement of the warning.*—Theſe letters you will find in St Martin. After reciting that the heritor had ſubſcribed a warning, they proceed thus: 'And 'in reſpect A. B. and C. D. two of the tenants, 'are preſently furth of the kingdom, and ſo 'cannot be warned in virtue of the ſaid pre-'cept: Therefore command, that ye paſs, 60 'days before the term of Whitſunday next, to 'market-croſs, pier and ſhore, and, in ſupple-'ment of the ſaid precept, lawfully warn and 'charge you, *&c.*'

According to theſe forms, it is impoſſible to remove a tenant for that year, unleſs both warning and removing are executed, and the action proceeded in, ſeveral months before the term of removing.

'Conform to the Act of Parliament made 'concerning warning of tenants to remove 'from lands.'

This

This clauſe became neceſſary after the Act 1555, the heritor having no title to warn in any other manner.

'Pretended tenants and poſſeſſors.'

The word *pretended*, is alwiſe uſed by Formaliſts, in writs calculated to quarrel or ſet aſide the rights of others. In ſome of them, it is proper, becauſe their titles are impugned as *void* from the beginning.—In the precept of warning, it is *improper;* becauſe there could be no uſe for the writ, unleſs the parties warned were *truly* in poſſeſſion, or tenants at the time. It ſhould be, 'Preſent tenants and poſ-'ſeſſors.'

'To flit and remove themſelves, their wives, 'bairns, ſervants, families, ſubtenants, cottars, 'goods and gear.'

In this enumeration, the *cattle, &c.* are omitted, unleſs we ſuppoſe them comprehended under 'goods and gear.'

The words *bairns* and *gear*, though now almoſt forgotten among the Engliſh, are original Saxon words, and uſed by the beſt Old Writers, as peculiar to rural affairs. Thus Milton—

'I ſhall appear ſome harmleſs villager,
'Whom thrift keeps up about his *country gear.*'

SUBTENANTS—The Tenant is warned to remove the ſubtenants, becauſe *their* right de-

 pends

pends upon *his;* and, as Craig ſays, they ought to know that it is their duty to remove along with him, tho' they ſhould not be mentioned in the warning.—But the reverſe will not hold. The warning of the ſubtenant will not remove the principal, even tho' the former ſhould be in the natural poſſeſſion.—The reaſon is given by the ſame Author: 'It would be unjuſt that thoſe 'who had no right or poſſeſſion from the pur-'ſuer, ſhould be obliged to remove at his in-'ſtance, if the perſons from whom they de-'rived right, and whoſe proper tenants they 'are, had not been warned, and an opportu-'nity given them of defending their own poſ-'ſeſſion.—For this reaſon (continues he) moſt 'people are careful, not only to warn the *na-'tural poſſeſſors*, but alſo all others from whom 'any of them derived right to the poſſeſſion.—'The Lords vary in their deciſions upon the 'neceſſity of this; but, in my opinion, it is 'clear, that no ſubtenants can be removed, 'without warning the principals, from whom 'poſſeſſion has been derived.'

Cottars are ſtill more dependent upon the Principal Tenants, and conſidered as *a part of their families.* I formerly explained to you the word *Cottar* *, and gave you an account of that claſs of people.

'From

* Frequent reference is made to Lectures intended to be delivered.

'From the ſaid lands, with the pertinents; 'and to deſiſt and ceaſe therefrom.'—To *leave* and *depart from* the ſame, would be better words; yet the former, being the words of the Act 1555, muſt be retained. — By *pertinents*, our Judges ſeem to have underſtood byres, barns, ſtables, and out-houſes. When tenants remove at Martinmas or Candlemas, their out-houſes, as already mentioned, are often allowed to remain in their poſſeſſion, for the preſervation of their corn and cattle, till the entry of the new poſſeſſor.

'Leave the ſame *void* and *redd*.'—Theſe words carried an important ſignification. Parties diſputing the property, often bribed the outgoing tenants to admit them quietly into poſſeſſion. 'This (ſays Craig) is not to be born: the te-'nant cannot be ſuffered, thus, by fraud or 'colluſion, to invert the poſſeſſion of his Maſter.' An attempt of the kind was tried ſo late as the 1713: but the Lords found, 'That the decreet 'was not fulfilled by the tenant's removal, 'when, by colluſion with him, another ſteps 'into the poſſeſſion; but he muſt deliver, or 'leave it *void and redd*. 21ſt July 1713, *Budge* 'contra *Sinclair*.'

'That I, my ſervants, *&c.* may peaceably 'bruik, joyce, and diſpoſe thereupon.'—*Bruik* is a Saxon word for *uſing*, bearing, or enjoying.

*Joyce* is from the French word *jouir*, to enjoy. Both are now almoſt obſolete even with us.

'Conform to my infeftment and ſaſine.'—This is improperly expreſſed: it ſhould be, conform to my *charter and ſaſine*, or conform to my infeftments, which include both, for the ſaſine is only *part of the infeftment*. A purchaſer muſt therefore be infeft, before he can remove tenants; for they are not bound to take notice of any perſonal rights: and the ſaſine, at leaſt, muſt be produced as the title in the action of removing. Tho' it is held, that, in a queſtion with tenants who have no real right to oppoſe, a ſaſine is ſufficient, yet the charter, to avoid objection, ſhould always accompany it.—Mr Erſkine ſeems to be of opinion, that a *bare diſpoſition* ought to be held as a good title in removing tenants who have no better right to produce.—'A diſpoſition (ſays he*, p. 274.) 'would not entitle the heretor to remove the 'tenants by decree of his own Court; but, by 'Common Law, he ſeems to be entitled to 'bring it before the Sheriff, in conſequence of 'his property, eſpecially as the diſpoſition car-'ries a right to the mails and duties, or, in 'other words, to the rent.'

Common

* Lord Bankton and Mr Erſkine imagined, that Barons and other Land-holders poſſeſſing territorial juriſdiction, might have removed

Common Law is a word very common in our books, but it is often difficult to know what the writer means by it.—Anterior to the Statute 1555, there was no ſuch rule acknowledged, or practice known. That Act ſuppoſes a compleat right in the perſon of the heretor, who takes the benefit of it; and it obliges him to uſe real execution, by leaving a copy upon the lands for all third parties having or pretending any real right.—Now, how could this be done by the holder of a bare diſpoſition? How could he do any acts, *quæ prædia tangunt*, as the Lawyers expreſs it, without a right in the lands themſelves? A ſecond diſpoſition, with a prior infeftment, might cut him out of his claim to the property forever. A perſonal diſpoſition carries mails and duties, not in conſequence of any right eſtabliſhed in the perſon of the diſponee, but as an exertion of the right remaining in the

removed tenants by the decree of their own Court; becauſe the Act 1555, beſides the Lords of Seſſion, and Sheriffs, Magiſtrates, *and other Judges Ordinar having juriſdiction.*

The very purpoſe of the Act, was to take the execution of this buſineſs out of the hands of the Maſter, and to place it in that of other Judges. The warner is ordered ‘ to come to theſe Judges, ‘ ſhowing his precept of warning orderly executed and indorſed, ‘ and to take letters from them.’—A vaſſal, therefore, of a Baron, might, under this ſalvo, apply to him; but, if the Baron was the warner, it is plain, from the words and purview of the Act, that he could not apply to *himſelf*. Had the Statute allowed this, it would have effected nothing.

the granter, who may aſſign his rents as he pleaſes, without diſponing his lands.—I have remarked upon the ſtyle of the precept, that it is an Act of juriſdiction; and the holders of perſonal rights, it is admitted, have no title to the exerciſe of any thing of that nature. Hence it is, that an heretor muſt be infeft at the time he uſes his warning, otherways it is null, as iſſued *a non habente poteſtatem*.—The only exceptions to this rule, are where the heretor derives right by *terce*, if a widower; and by *courteſy*, if he be the huſband of an heireſs. The reaſon is plain: Such proprietors reſt upon the ſaſine of the heireſs or the huſband, and need no ſecond inveſtiture to compleat their right.—The next is the caſe of an apparent heir uſing the warning upon apparency, and compleating his infeftment before the removing. Apparency is, in law, held to be a title of poſſeſſion in many caſes; and, amongſt others, it is held ſufficient to ſupport a warning, if infeftment follows; becauſe the poſterior titles have a retroſpect to thoſe of the anceſtors, join with them, and form a legal continuity: they make the heir, in the law phraſe, *una et eadem perſona cum defuncto*.—This point was determined in the time of Craig. 'Our manners (ſays that Author) differ much 'from thoſe of our anceſtors. They poſitively 'required, that, both at the date of the warn-

'ing

'ing and removing, the warner ſhould be the 'verus dominus.'

Where the tenants derive their right from the uſer of the warning; it is conſonant both to law and common ſenſe, that they ſhould not be allowed to enquire into, or to quarrel that right. Their own poſſeſſion depends upon it; and, therefore, they muſt obey the order of their Maſter.—'Non enim ferendus eſt colo-'nus (ſays Craig) qui cum eo, a quo cauſam 'poſſeſſionis habet, de jure ejuſdem poſſeſſionis 'velit contendere; ſed ut ab eo poſſeſſionem 'acceperat, et ei reſtituere cogendus eſt.'

Infeftments upon precepts of *clare conſtat*, are common titles in removings, though their ſufficiency is much doubted by Stair, and the doubt repeated by Mr Erſkine. The reaſon aſſigned is, That unleſs the immediate anceſtor of the perſon infeft had been in poſſeſſion, his title imports nothing more than the aſſertion of a ſuperior.

'And that ye uſe the whole remanent order, '&c. &c.'

This general direction relative to the Statute 1555, is preferable to the other form of making it ſpecial, and repeating the direction of the Act.—The ſhorter the writ is, the leſs handle it affords of committing error.—The heretor ordains

dains every thing to be done according to law, and gives ground for a preſumption that it was accordingly done, when the contrary does not appear from the execution.

'Certifying them that they are to be held 'as violent poſſeſſors.'—This does not appear to be preciſely authoriſed by the Act. The certification of the Act is, That they ſhall be decerned to remove by order of the Judges Ordinary.——'And letters direct *ſimpliciter* upon 'them in the ſaid matter,' *i. e.* That letters of ejection ſhould immediately be iſſued againſt them.—This is alſo the certification even of the ſummons.

'According to Juſtice, &c.'—This concluſion is copied from the King's letters: it is the language of authority, which all landholders in this country conceived themſelves to be poſſeſſed of.

The precept being then a kind of judicial *writ*, does not fall under the Stamp Act. It muſt, however, be ſubſcribed before witneſſes, with all the formalities of private deeds.

In executing this warrant, the officer may either begin with the ceremony at the church, or he may ſerve it upon the tenant. He ought to read the precept, and then deliver him a kind of ſchedule, with us termed a *ſhort copy*.

'I ——— ——— Officer in that part ſpe-
'cially conſtitute, by the Precept of Warning
'after mentioned, directed to me by A. here-
'retable proprietor of the lands of ,
'conform to the ſaid Principal Precept ſign-
'ed by him of date the 27th March 1764
'years, do hereby, and by virtue hereof, warn
'you to flit and remove yourſelf, wife, bairns,
'family, ſervants, ſubtenants, cottars, goods
'and gear, furth and from *(here the lands are*
*'inſerted as in the precept)* and to leave the ſame
'void and redd at the term of *Whitſunday* next
'to come; to the effect that the ſaid A. as he-
'retor thereof, his tenants, ſervants, and others
'in his name, may enter peaceably thereto at
'the ſaid term; with certification in manner
'mentioned in the ſaid principal precept of
'warning. This I give you upon the 28th
'day of March 1782 years, before theſe wit-
'neſſes.'——

After having left another upon the lands, and gone through the ſolemnities preſcribed at the church, he returns an execution, which we will next conſider—

'Upon the day of 1764,
'I ——— ——— Officer in that part
'ſpecially conſtitute, by virtue of the within-
'written Precept of Warning, paſſed to the
'dwelling-houſe of the within-deſigned F. pre-

'ſent tenant and poſſeſſor of the lands of
'and alſo to the ground of the ſaid lands, and
'lawfully warned, conform to the Act of Par-
'liament made anent warning of tenants to
'remove from lands in all points, the ſaid F.
'to flit and remove himſelf, his wife, bairns,
'family, ſervants, ſubtenants, cottars, corns,
'cattle, goods and gear, furth and from the
'ſaid lands, with the pertinents and houſes,
'and yards and others thereto belonging; and
'to leave the ſame void and redd at the term
'of Whitſunday next to come, to the effect the
'within-deſigned A. and his tenants, and others
'in their names, may enter thereto, and peace-
'ably poſſeſs, bruik, occupy, and labour the
'ſame at their pleaſure:—And alſo, upon the
'day of and year fore-
'ſaid, being Sunday, I paſſed to the pariſh-
'kirk of within which pariſh the
'ſaid lands lie; and at the moſt patent door
'thereof, at the diſmiſſing of the congregation
'from the forenoon's ſermon, after crying of
'three ſeveral oyeſſes, I read and made public
'intimation of the within precept, in audience
'of the pariſhioners conveened thereat for the
'time, and made certification as is within ex-
'preſſed. This I did conform to the ſaid
'principal precept in all points, whereof I
'delivered a juſt copy, ſigned by me, to the
'ſaid

'ſaid F. perſonally apprehended; and I affixed
'and left the like copy upon the grounds of the
'ſaid lands, upon the day of
'that none pretend ignorance of the ſame; all
'which copies did bear and contain the reſpec-
'tive dates hereof, and the witneſſes names
'and deſignations preſent at the haill premiſ-
'ſes, *viz.* at the dwelling-houſe, and upon the
'ground of the ſaid lands M. and T. and at the
'church-door I. and G.; and, for the more ve-
'rification of this my execution, the ſame is
'ſubſcribed by me and the ſaid witneſſes.'

'*I delivered a juſt copy.*'—The ſhort copy is called a juſt one, becauſe it recites the precept, and is regulated by it.—There is a material difference between juſt or ſhort copies, and full ones. In treating of the execution of ſummonſes, you will be completely informed upon this article. Suffice it to mention at preſent, that, very long after the Act 1555, the ſervice of all writs was made by delivering ſchedules containing the principal circumſtances of the matter.—This method has been retained in ſome caſes, and altered in others, by Acts of Sederunt.—Precepts of Warning are among the former.

'*I affixed and left the like copy upon the lands.*'—The method of affixing this copy is, by putting it into the cleft of a ſtick, and this ſtick upright into the ground.

The ſame piece of form, as we ſhall afterwards more particularly learn, is uſed in real execution; and the purpoſe is to give notice to all ſubtenants, or other perſons intereſted in the property. It is therefore required to be done ſeparately from the notification to the tenant himſelf; and without it, the warning is null.—So the Court have more than once found.

If the tenant does not remove, the next thing to be done is to expedite, or (as we ſay) *raiſe* a ſummons of removing, either before the Lords, or the Judge Ordinary *. The proprietor firſt ſtates his titles to the lands; then the precept of warning, and executions. The lybel next charges, that the term of Whitſunday is paſt, and that the tenant notwithſtanding refuſes to remove. The tenants are warned upon ſix days to hear themſelves decerned to flit, *&c.* St Martin adds, 'That this ſummons requires 'no ſecond diet, *becauſe all is inſtructed by writ.*' He had a better reaſon to give, *viz.* That it proceeds upon the Act of Parliament 1555, which appoints only one citation upon ſix days.

At the time this eminent Conveyancer collected his Forms, the mode of ſuing the action of removing before the term, was little known or noticed, otherwiſe we ſhould have here found a note upon that ſubject. Accordingly you have heard,

* St Martin, p. 201.

heard, that the point rests upon no more than two decisions, at ten years distance from each other.

Supposing the decree of removing to be obtained, the term arrived, and the tenant continuing, or, as the English say, *holding over*, he is no doubt to be ejected by the hand of the law.—Let us then consider the practical mode of carrying this into execution.

The Sheriff, immediately after decreet, issued his Precept of Ejection, which was executed in 24 hours, if the tenant did not move.—That time *(de praxi)* was given as a reasonable space for the removal, and no more. You will here call to remembrance, that no execution upon any decree, even *for payment of debt*, ever required a previous charge, when the person of the debitor was not to be affected; and that *poindings* followed both by law and practice in that manner, before the Act 1669, appointing previous charges to be given.

The ejectment of possessors decreed to remove, needed no previous charge. It immediately followed the decree; nor was a charge consonant to the nature of the thing, which required the utmost dispatch. — After the 1669, however, Charges upon Decrees of Removing, were, it seems, introduced from a *false analogy*. The point came to be tried in a few years after, when the Lords, with great propriety,

priety, found that the Act 1669 extended only to *poindings*, and ſuſtained the ejectment without a previous charge *. Notwithſtanding this pointed and ſenſible deciſion, charges upon decrees of removing, even of Inferior Judges, crept in from the ignorance and timidity of practitioners, and added greatly to the embarraſſment of the buſineſs. Craig and Stair take no notice of this circumſtance, becauſe the firſt never ſuppoſed any ſuch thing, and the error was not conſpicuous at the time of Lord Stair's publication, though he reports the judgment I have mentioned. The Act 1669 excepts 'all 'decreets recovered at the inſtance of heritors 'againſt their tenants, in their own Courts; 'and therefore (ſays Sir George M'Kenzie) it 'has been doubted whether tenants may be 'removed and ejected without a previous 'charge †. And though (continues he) upon 'decreets before the Lords, previous charges 'are neceſſary; yet, upon decreets of removing before Inferior Courts, it is the cuſtom 'to eject immediately: and though this may 'ſeem hard, yet it is neceſſary, becauſe the 'intrant tenant muſt remove immediately, and 'ſo muſt have a place to which he may remove; *et ſibi imputet* the tenant, who, being 'warned,

* 30th June 1675, *Lady Stainhill* againſt *Burd.*

† Becauſe the removings were always obtained before other Judges, and not in the Baron Courts.

'warned, did not provide himſelf timeouſly*.' —Here indeed it may be ſaid, *Aliquando bonus dormitat Homerus.* If ſuch a neceſſity exiſted for the immediate removing of tenants decreed to quit their poſſeſſions by Inferior Judges, did not the ſame neceſſity operate againſt thoſe decreed by the Lords?—or, had Inferior Judges a compleat remedy in their power, which the Supreme Court had not? — In the only caſe where the queſtion had occurred, the Lords found that the Act 1669 related to poindings only. No charge was neceſſary before that time, in any caſe; and, therefore, no charge could be neceſſary upon their own decreets, ſince the date of the Act.—After all, Lord Bankton thus doubtfully expreſſes his opinion: 'Though, 'in ſtrict law, Letters of Ejection may be exe-'cuted without a previous warning, yet the 'ſafeſt courſe is to uſe it, as is ordinarily prac-'tiſed, on *ſix* days charge.'

The true reaſon of this difference between the practice of the Superior and Inferior Courts, is to be found in the nature of the diligence iſſued by the Court of Seſſion, which always conſiſted of *Letters of Horning*. This circumſtance not only gave riſe to the previous charge, but it inverted the very nature of decrees of removing, when pronounced by the Lords of Seſſion;

* Obſ. on the Act 1669.

ſion; and, in place of an expeditious diligence, it rendered them, in point of procedure, one of the heavieſt and moſt operoſe executions known in the law.—

1*ſt*, The tenants are to be charged, in virtue of letters of horning, to remove in ſix days: 2*d*, They are to be denounced rebels, and the horning regiſtered: and, 3*tio*, Both decree and horning muſt be produced, with a bill praying for letters of ejection, directed to the Sheriff; and, upon theſe letters, the Sheriffs were charged to remove the tenants in ſix days more.—St Martin* gives us the ſtyle of a horning upon a decree obtained before the Sheriff. This horning charges the tenants to remove in *ſix days*; and, to explain that circumſtance, he adds a note in theſe words: 'Since it is ſaid formerly, 'that, in all hornings before Inferior Judges, 'decreets are to be on 15 days, why not this? '—*The anſwer is clear*, The removings are pri-'vileged, being peremptory.—Some (continues 'St Martin) raiſe captions after the tenants are 'charged, denounced, and regiſtrated at the 'horn; and others do not give themſelves the 'trouble, but raiſe letters of ejection directed 'to the Sheriff.'

The Writers to the Signet have, in this buſineſs, acted upon the falſe analogy already mentioned: and St Martin's anſwer, here given, is

* P. 460.

is by no means *a clear or a good one.* The error is not difficult to diſcover; it is only directing the view to a leading feature in the Practice of the Law of Scotland.—Our anceſtors knew of no compulſitor againſt the perſons of the ſubjects, but by involving them in rebellion: Hence, *Letters of Horning and Denunciation* will be found to be the conſtant executorials of all decrees, whether they be iſſued for payment of ſums, or *ad facta preſtanda.* Now, tenants were not the only people to be removed by the hand of the Law. —Powerful heretors poſſeſſed of lands which had been controverted, — wadſetters of lands fairly redeemed, and many others of the higher claſſes, were to be forced to give up their poſſeſſions. In theſe caſes, the hereditary Sheriffs were often unwilling to act, ſometimes unable; far leſs could any thing be done by Sheriffs, *in that part.* The Supreme Power then became neceſſary; and, on purpoſe to have that aid, Letters of Horning were applied for, in order that the obſtinate poſſeſſor might be denounced *Rebel.*—Letters of Ejection were next iſſued againſt them in that character; and if they, after all, ventured to deforce the Officers of the Law, they became guilty, at once, of both *civil* and *actual rebellion.* The matter was laid before the Privy Council, who iſſued the barbarous commiſſion of a weak Government—the

*Letters of Fire and Sword!*—The Horning being once eſtabliſhed as the executorial of the Court in Removings, continued to be applied for againſt ſimple tenants.—In St Martin's time, the practice had been common: 'Some people '(ſays he) did not give themſelves the trouble 'of ejecting the tenants, but followed the ordi-'nary courſe of captions, *&c.*'—This, to us, appears ſtrange; but the ſurpriſe ceaſes, when we recollect the effect of *Civil Rebellion.* In moſt caſes, it muſt have proved an effectual compulſitor; but it evidently led the Writers to the Signet into error. It was neceſſary that a denunciation of rebellion ſhould be preceded by a charge; and this neceſſity riveted the ſuperfluous practice of giving a charge upon decreets of removing. As the charge was a work of ſupererogation, the ſix days might be ſufficient; but this could be no reaſon for giving *hornings* upon ſix days. And the reaſon mentioned by St Martin, that removings were privileged, is a bad one. The ſummons only was privileged; but a man ought not to have been denounced Rebel upon fewer than the ſtated *inducia* of fifteen*.—There was no law for making him a rebel, for refuſing to remove *nine days* ſooner than in any other caſe. It was no leſs an abſurdity to make a horning and denunciation

* Fifteen days were the common *inducia*.

ciation the neceſſary warrant of Letters of Ejection in common caſes, where no capital reſiſtance was expected. If a Sheriff iſſued Letters of Ejection upon his own decreet *ſimpliciter*, was it not evident that the Court of Seſſion could do the ſame, either in aid of that Sheriff's decree, or their own? and yet theſe unneceſſary forms have been ſervilely kept up from St Martin's time, and are to be found in all our Chamber Style-books at this moment.

Writers have ſeldom any objection to accumulate *Letters* upon *Letters*, and *Charge* upon *Charge;* but, in place of correcting, Lawyers have ſanctified this clumſy procedure.—In our lateſt ſyſtem, we are told, 'That if a tenant 'ſhall refuſe to give obedience to a Decree of 'Removing, *notwithſtanding a Charge given upon 'Letters of Horning*, the obtainer of the decree 'may procure Letters of Ejection from the Sig-'net, directed to the Sheriff, who is required 'to diſpoſſeſs him. *But if the decree be pronoun-'ced by the Sheriff*, he himſelf may grant a Pre-'cept of Ejection, directed to his own officer, 'for the ſame purpoſe *.'

The Sheriff, according to this authority, can do what the Lords of Seſſion cannot; and yet the Act 1555 is moſt expreſs upon the point.—The heretor is directed to apply, either to the Lords, or to the Sheriff, for the ſummons.—



* Erſkine, p. 692. § 17.

Theſe Judges are authoriſed to decern the poſſeſſors to ceaſe, remove, and deſiſt from the lands; 'with certification to them, if they faillie, that 'Letters ſhall be directed *ſimpliciter* upon them 'in the ſaid matter,' *i. e. Letters of Ejection.*—The Sheriffs have retained this power: The Lords, it ſeems, have *(de praxi)* loſt it in the manner I have deſcribed.

The Letters of Ejection we have in Dallas *; and they accordingly recite the Decreet, the Horning, the Denunciation, and Regiſtration. —They ſubſume, 'That, notwithſtanding 'thereof, the perſons moſt contemptuouſly 'continue in the poſſeſſion.'—The execution of the Ejection is properly committed to the Sheriff, or his deputes: It was an original part of his duty, by our ancient law; and it continues to be ſo in England ſtill.—He is directed to remove the former poſſeſſors, and to introduce the complainer, and thoſe in his right, with all the ſolemnities uſual in the like caſes. —St Martin then informs us, 'That the Sheriff, 'or his deputes, give obedience, or he appoints 'a meſſenger his depute in that part:'—And, 'That Letters of Ejection were afterwards di-'rected to meſſengers, as ſheriffs in that part; 'ſo that Sheriffs, or their officers, were ſeldom 'troubled in this buſineſs, excepting when the 'Ejection proceeded upon their own warrant.'

The

* Page 462.

The ſolemnities upon this occaſion are theſe: The meſſenger, with a perſon as procurator for the Maſter, properly attended, repairs to the tenant's houſes, thruſts the people he finds out of the door, and the cattle out of the byres, ſtables, *&c.* drives them to the high road, extinguiſhes the fires, locks the doors, and delivers the keys to the proprietor, or his attorney.

It is not the practice, in this caſe, to return *any execution*; for no perſon is preſumed to have a remaining intereſt in removing, as in the matter of poinding, where the debtor is entitled to a ſchedule of his effects for his diſcharge, and to quarrel the valuations. The remedy of the tenant, if wronged in removal, is an action of ejection and damages; and therefore it is uſual to have a notary attending, to take inſtruments in his hands upon the order of the proceedings, and to make a liſt of the particulars ejected *. When extended, it is termed 'An *Inſtrument of* 'Ejection,' and ſigned by the notary and meſſenger.

The former poſſeſſors being removed, the next ſolemnities regarded the introduction of the bearer of the Letters of Ejection. The Meſſenger or Sheriff delivered him the ſtilts of a plough; after which, he himſelf, or ſervants, plowed

* This liſt prevents all after-alledgances of more goods being on the ſpot, or in the houſes, than really were found there.

plowed a ridge or two; and an inſtrument upon the *res geſta* was taken, called an *Inſtrument of Poſſeſſion*.—Theſe inſtruments were ſometimes taken and extended ſeparately *.

Having thus diſcuſſed the Removing upon the Act 1555, I ſhall add a few Caſes occurring upon it, which the Forms did not give an opportunity of remarking.

One of the earlieſt queſtions moved upon that Statute, was, Whether the heirs or proprietors could avail themſelves of warnings uſed by their deceaſt predeceſſors?—Objections were accordingly made upon that head, and repelled †.

The greater part of the diſputes in this buſineſs, have regarded the titles of the uſer of the warning. It is not competent to tackſmen, unleſs their leaſes were either for their own lives, or contained an expreſs power to input and output tenants, or at leaſt if they were not in the actual receipt of the rents from the ſubtenants.

If a proprietor warns his tenant, and then ſells his lands, he may aſſign the warning to his ſucceſſor: but that ſucceſſor muſt be infeft before he can uſe it; for, after the Maſter is denuded, he cannot inſiſt in the Removing; and unleſs the titles of the purchaſer be compleat, he cannot make uſe of the warning given by his predeceſſor. The beſt way, in theſe caſes, is to bring the

* *Vide* Appendix, N° 3.

† Balfour, p. 457.

the action of removing at the inſtance of both; and then, as Craig adviſes, 'Mutuus utriuſque tam cedentis quam ceſſionarii conſenſus concurrit.'

Notwithſtanding the great alteration in the manners of the people, and the prevalence of ordinary learning among the lower ranks (I mean reading and writing) ſince the beginning of this century; yet it proved a matter of great difficulty, to get a warning executed free of error. Formerly, when meſſengers and lower officers could do little more than ſign their names, they acted under the inſpection of others more knowing, and had their executions made out, or carefully peruſed. But when they judged themſelves able to act without aſſiſtance, errors for ſome time multiplied exceedingly. The matter of removing tenants, in particular, became uncertain and expenſive—in ſo much that inſtances, in remote parts of the country, have occurred, where poſſeſſions had been retained for years ſucceſſively, and, after all, the tenants have yielded only upon compromiſe.

At the period of the Act 1555, it appeared of little conſequence to the Public, whether the Maſter changed his tenants or not, provided it was brought about in peace. There was no great difference, in knowledge or induſtry, between the new and the old tenant. Improve-

ments

ments were not in faſhion, or in the expectation of parties.—A different ſpirit at laſt inſpired both the Maſter and the tenant—Improvement of the land, with a number of proprietors, became the point in view—A riſe of rent (no matter how) with others. Poſſeſſors, who kept themſelves in their farms by law, had no mercy upon the ſoil. In ſhort, it appeared to the nation, that the ſimplifying the buſineſs of removing tenants, had become requiſite to the commerce of farms, and advancement of agriculture.

Independent of the method chalked out by the Act 1555, there were ſeveral grounds for the removal of tenants at common law; ſome of which have been noticed in the Lecture upon leaſes, others fall under the preſent ſubject.—Theſe were termed *ſummary*, in contradiſtinction to the *ſolemn* removing we have been conſidering. Theſe ſummary actions the Lords of Seſſion were undoubtedly entitled to regulate, by their own authority. The Court, however, took the *whole buſineſs* under their conſideration, and, in December 1756, iſſued the well-known *Act of Sederunt anent removing of tenants.*

No ordinance of the Lords of Seſſion ever created ſo many doubts, murmurings, and reflections, as this one has done, both with regard to the authority of enacting it, and the matter enacted.

enacted.—I ſhall, therefore, with freedom, and I hope without offence, analize the regulations thus introduced, and candidly ſtate the complaints againſt them, ſo far as my knowledge or information will permit me.

*Dec.* 14. 1756.

Preamble of the Act.

'WHEREAS the difficulties that have occurred in actions of removing from lands, have been found highly prejudicial to Agriculture, and both to Maſters and Tenants, in reſpect that, during the dependence of ſuch actions, the lands are neglected and deteriorated by the defender, and the heretor's ſecurity for his rent brought into danger; and tenants are diſcouraged from entering into tacks, by the uncertainty of attaining to poſſeſſion, and by their finding the ſubject of their tack much deteriorate, during the dependence of the proceſs of removing againſt the preceding tenant—The Lords of Council and Seſſion, reſolving to remedy this great evil, do make the following regulations: 1*mo*, That where a tenant is bound by his tack to remove without warning at the iſſue or determination of his tack, it ſhall be lawful to the heretor, or other ſetter of the tack, upon ſuch obligation, to obtain Letters of Horning, and thereupon to charge the tenant with Horning 40 days preceding the term of Whitſunday in the

'year in which his tack is to determine, or 40 'days preceding any other term of Whitſunday 'thereafter: and, upon production of ſuch 'tack, and horning duly executed, to the De-'puty Sheriff, or Stewart, or their Subſtitutes, 'of the ſhire or ſtewartry where the lands lie, 'they are hereby authoriſed and required, with-'in ſix days after the term of removal appoint-'ed by the tack, to eject ſuch tenant, and to de-'liver the poſſeſſion void to the ſetter, or thoſe 'having right from him.'

This clauſe concerns conventional agreements only: it is therefore by all agreed to be within the power of the Lords, eſpecially ſince they had been accuſtomed to judge of theſe clauſes, as not under the purview of the Act 1555; and yet this very regulation proceeds upon the contrary idea. It is plain, that the Court has, in this place, done Lord Stair the honour of exalting his opinion into Law.—'The Statute 'for warning (ſays he) is a public Act, intro-'duced for the good of poor tenants, whoſe 'ruſticity is excuſable, if they advert not to 'anterior pactions; *nam pacta privatorum non 'derogant jure communi.* Yet, on the contrary, '*cuicunque libet, renunciare juri pro ſe introducto;* 'betwixt which I conceive this temperament 'will hold, that ſuch pactions may be effectual 'at the preciſe time, if ſufficient intimation be

'given

'given to the tenant to provide for himſelf.—
'And I ſuppoſe that they will walk moſt fair-
'ly and ſafely, who ſhall intimate the ſame to
'the tenant.'

This appears to be a very ſound opinion; for, if tenants are allowed to renounce the privilege of warning or due notice, the condition will ſoon be impoſed upon them; and the very hardſhips and diſorder remedied by the Act 1555, might be in ſome degree revived.

The clauſe authoriſes a charge, not only at the term of Whitſunday, *where the tack expires* at Whitſunday, but preceding *any other term of Whitſunday thereafter*. This goes upon the idea of what is in law termed *tacit relocation*, i. e, a relocation or ſecond tack in the ſame terms with the former, preſumed from the ſilence or acquieſcence of the proprietor in not warning his tenant to remove. The years poſſeſſed under this title, are conſidered to be a continuation of the terms in the written leaſe, becauſe every thing continues to be thereby regulated between the parties; and therefore it is reaſonable and juſt, that the obligation to remove ſhould alſo continue in force, as this Act directs. And hence we now have the exact value or import of the obligations to remove contained in tacks, and which, ſince the date of this Act of Sederunt, are ſeldom or never omitted.

If, upon expiration of the leaſe, any new verbal bargain takes place between the tenant and the Maſter, which alters the terms of the former one in any article, I apprehend that the clauſe we are talking of would from that moment loſe its force, and that a charge of horning would be of no effect; becauſe, by the ſuperveening agreement, the tacit relocation entirely ceaſed.

The Horning authoriſed by this Act, paſſes upon a bill, with which the leaſe is produced, either regiſtrated or not. The bill prays for Letters of Horning, for charging the tenant to remove in terms of the Act of Sederunt of their Lordſhips *made anent Removings*. The tenant is charged to remove at the enſuing Whitſunday, in the *words* of the obligatory clauſe, from which the *words* of the horning ſhould be taken.

When the term of Whitſunday arrives, the charger produces his executed horning, with a petition to the Sheriff, praying for his warrant to eject the tenant *. It is accordingly granted, and executed in the manner I have formerly laid before you. This is the very method preſcribed by the old Act of Parliament againſt violent poſſeſſors; and it differs from the Act 1555, in this material point, That, in place of a Summons of Removing, which by that Act

* A petition is ſeldom given in upon this occaſion; the horning only is produced, which is not a commendable practice.

Act the Sheriff was bound to give, he muſt in this caſe iſſue *an immediate Warrant of Ejection* *.

Suppoſing the Maſter, in this caſe, not to apply to the Sheriff, but to the Court of Seſſion, What compulſitor would the Court decree? Letters of Ejection, certainly. But the warrant muſt be *a ſpecial one*, upon a petition; for, the Writers to the Signet could give nothing but a caption upon ſuch a horning.—The Act of Sederunt gives no power to go further: and Letters of Ejection can only follow upon the Act 1555, with which this kind of removing has no relation.

The tenant cannot be heard upon any objections he may have, before the Judge Ordinary, who is here miniſterial: his only method is, to ſuſpend the charge of horning.—If his objections are good, he will preſent his bill *immediately* after removing; if otherwiſe, he will delay to the laſt, which never fails to afford a preſumption againſt him.

2d Clauſe of the Act.

'WHERE the tenant hath not obliged himſelf to remove without warning, in ſuch a caſe it ſhall be lawful to the heretor, or other ſetter of the tack, in his option, either to uſe the order preſcribed by the Act of Parliament made in the year 1555, intitled *Act anent the Warning of Tenants*, and thereupon purſue

'a

* Appendix, No. 5.

'a warning and ejection, or to bring his ac-
'tion of removing againſt the tenant before
'the Judge Ordinary: and ſuch action being
'called before the Judge Ordinary, at leaſt 40
'days before the term of Whitſunday, ſhall be
'held as equal to a warning execute in terms
'of the foreſaid Act: And the Judge ſhall
'thereupon proceed to determine in the re-
'moving in the terms of that Act, in the ſame
'manner as if a warning had been executed
'in terms of the foreſaid Act of Parliament.'

It is this clauſe of the Act, which has chiefly created the doubts with regard to the powers of the Court.——The Act 1555, it is ſaid, was a ſolemn Statute of the Legiſlature of our country, in daily obſervance; and it is argued, That the Lords of Seſſion had not a title to *alter*, much leſs to *repeal* it.—On the other hand, it has been anſwered, That the Act was not repealed—an option being left to the ſubject to follow the method therein preſcribed, if judged proper.—The Act of Parliament, it is obſerved in reply, ordains, That, *in all times thereafter, the warning of all tenants and others* ſhould be *in the manner thereby appointed.* Accordingly it was, for two centuries, followed by the ſubjects; and explained by the Courts of Law, to the abſolute excluſion of all other methods of removing.—That this clauſe of the Act of Sederunt diſpenſes

with

with the Statute: but a diſpenſing power is lodged in no Court of Britain—not in the Sovereign himſelf. The very term was proſcribed at the Revolution, and prerogative has denied all relation to it ever ſince*. — Further, it is ſaid, That the Act of Sederunt does more than *diſpenſe*, it introduces a form altogether different, and is therefore *a direct repeal* of the Act of Parliament:—that the expediency of any law ought not, among a free people, to ſupply its want of authority:—that the ſole power of making laws, is veſted in the King, Lords, and Commons: and the attempts of any other ſet of men in the nation, particularly of Judges, ought to be repreſſed; for, where the legiſlative and judicative powers meet in one body of men, *Liberty is at an end*†.

It is alſo remarked, that the power of making rules for the conduct of buſineſs, and adding expedition to juſtice, is inherent in all Supreme Courts. —At the inſtitution of our College of Juſtice by James V. this power was ſpecially beſtowed upon the Judges. By the Act 1540, § 93. 'they are empowered 'to make ſuch Statutes, Acts, and Ordinan-

'ces,

* Monteſquieu.

† By the 1ſt of William and Mary, Stat. 2. c. 2. it is declared, That the pretended power of ſuſpending or diſpenſing with laws, or the execution of laws, by regal authority, without conſent of Parliament, *is illegal.*

'ces, as they ſhould think expedient, for or-
'dering of proceſs, and haſtie expedition of
'juſtice.'—Our Parliament, however, conceiv-
ed not that they were thereby devolving any
ſhare of legiſlation upon the Court of Seſſion.
Warnings of tenants, at that time, called loud-
ly for reformation; but the reformation was
not brought about by the Lords. It was to
Parliament the country owed the Statute 1555,
and not to an Act of Sederunt.—If, then, an Act
of Sederunt was deemed incompetent to diſ-
charge even the then barbarous mode of re-
moving tenants, how comes it that the Act of
Parliament 1555, made on that account, has
been aboliſhed, after the approbation of ages,
by the power of *an Act of Sederunt?*

*Laſtly*—Suppoſing the Act anent removing
of tenants had been a Britiſh Statute, it is
aſked, if the Court of Seſſion would have choſen
to promulgate the Sederunt 1756?—If not, it is
hard to underſtand what ſuperiority a Scotſman
ought to acknowledge in a Britiſh Statute, over
one of our own national Parliament, *in viridiſ-
ſima obſervantia.*

HAVING thus ſtated the objections to the power
of enacting this clauſe of the Act of Sederunt, I
muſt, with equal freedom, pay a compliment to
the expediency and juſtice of an alteration, which
intro-

introduces ſimplicity, in place of a diſtreſſing ſet of forms, according to the manners of the modern times, altogether ſuperfluous. The dependence of a proceſs of removing in the Sheriff-Court, for 40 days preceding the term, is certainly equal, if not ſuperior to the notifications in the Act 1555; unleſs we can ſuppoſe, that, ſince this Act was made, as all acknowledge, in aid of our tenantry, the Legiſlature meant to give them the advantage of a legal intrenchment in forms.

The ſummons raiſed by authority of this ordinance, recites the title of the purſuer, the Act of Sederunt, and expiration of the tenant's leaſe. The decreet obtained muſt be executed after the old manner, *i.e.* either by precept from the Sheriff, or by horning, denunciation, and letters of ejectment.—I ſhall conclude my commentary upon this clauſe with a ſingle obſervation, *viz.* That the words of it, after all, do not appear to be ſufficient to authoriſe the removal of any tenants, but ſuch as have poſſeſſed *by written leaſes*. The words are, 'Where the tenant had not obliged himſelf to remove without warning.'—This evidently preſumes, that a written tack had ſubſiſted between the parties, and was then expired. Accordingly the Act proceeds, 'It 'ſhall be lawful to the heretor, or other ſetter of the tack.'—From whence, with due deference,

I apprehend that tenants poſſeſſing without tacks, or upon new bargains, after the expiration of the former ones, ought not to be removed upon this Act of Sederunt; for, all ſtatutory laws ought, with us, to receive the ſame ſtrict interpretation as in England; and there the right of a tenant by ſufferance, *i. e.* after expiration of a leaſe, is conſidered as differing in many circumſtances from a tenant-at-will.

3d Clauſe. 'WHERE a tack is aſſigned, and the aſſignation not intimated by an inſtrument; or where lands are ſubſet, in whole or in part, to ſubtenants, and ſuch horning execute as aforeſaid; or where proceſs of removing and decreet is obtained; or where warning, in terms of the Act 1555, is uſed againſt the principal original tackſman, the ſame ſhall be effectual againſt the aſſignees or ſubtenants one or more; and the action of removing againſt the principal or original tackſman, and decreet of removing following thereon, ſhall be effectual againſt ſuch aſſignees and ſubtenants as aforeſaid, and ſhall be ſufficient ground of ejecting them; any thing in the former practice to the contrary notwithſtanding.'

The foregoing *proviſo* is intended to ſupply the real execution of the Act 1555; with reſpect to ſubtenants or others deriving right from the principal

principal tackſman, all of whom were included in the feudal form of leaving a copy on the ground.—An aſſignee, without intimation, had no title, by common law, to be warned; and it was impoſſible to acknowledge him, unleſs he made his right known. From the moment he did ſo, he became, as it were, *principal tackſman*, and it was neceſſary that he ſhould be warned. The warning directed by the Act 1555, was always effectual againſt ſuch aſſignees and ſubtenants.

4th Clauſe.

'WHERE a tenant hath irritated his tack, 'by ſuffering two years rent to be in arrear, 'it ſhall be lawful to the ſetter or heretor to 'declare the irritancy before the Judge Ordi- 'nary, and to inſiſt in a Summary Removing 'before him: And it ſhall be lawful to the 'Sheriff or Stewart-depute, or their ſubſtitutes, 'to find the irritancy incurred, and to decern 'in the removing; any practice to the contrary 'notwithſtanding.'

It is likeways doubted, whether this article be within the power of the Court.—You have heard, that as, in the Roman contract of *location*, ſo in the Scottiſh *leaſe*, the failure in payment of two conſecutive years rent *voided the contract*: But the fact muſt have been aſcertained and declared by the authority of a Court, the rule

being almoſt *verbatim* derived from the Roman Law. Now it was an early rule in our practice, that all actions tending to void or irritate the rights of the ſubject, are competent only before the Court of Seſſion. — The importance of the ſuit entitled the ſubjects concerned to have them judged in the Supreme Court of the nation.—The irritancy of leaſes or feus *ob non ſolutum canonem*, could only be declared by the Lords: And the earlieſt Statute in which theſe Judges are mentioned, declares, 'That they ſhall knaw upon all ſpoliations of 'tacks and maillings.'—By the Act of Sederunt, the Lords devolve that part of their juriſdiction upon the Sheriff; at leaſt they give him a joint or cumulative juriſdiction in this matter with themſelves.—This faculty of delegation, or devolution of power, it is ſaid, does not appear to reſide even in the *Supreme Court*.—The juriſdiction veſted in the Sovereign Judges, is held to be *a part of the rights of the people*, which cannot be encroached upon.—So attentive was the Court of Seſſion to this point, that, in an early caſe reported by Hope, they found, 'That a declarator of nullity of a right 'could not be purſued before an Inferior Court, 'although the party had ſubmitted to it by 'private contract, and even come under expreſs 'obligations for that effect.'

'WHERE

5th Clauſe.

'WHERE a tenant ſhall run in arrear in one full year's rent, or ſhall deſert his poſſeſſion, and leave it unlaboured at the uſual time of labouring; in theſe, or either of theſe caſes, it ſhall be lawful to the heretor, or other ſetter of the lands, to bring his action againſt the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for five crops following, or during the currency of the tack, if the tack is of ſhorter endurance than five years, within a certain time to be limited by the Judge; and, failing thereof, to decern the tenant ſummarily to remove, and to eject him, in the ſame manner as if the tack were determined, and the tenant had been legally warned in the terms of the foreſaid Act 1555.'

This is another caſe, which, at Common Law, gives the heretor a right to ſet aſide the leaſe, and to remove the tenant. The action was conſidered as a *remedium extraordinarium*, reſciſſory in its nature, and important to the lieges. The Lords, therefore, in a great many caſes, refuſed to allow the Sheriffs, and other inferior Judges, to interfere in actions of that kind. Hence, this article in the Act of Sederunt became neceſſary, to beſtow a new juriſdiction upon the Sheriffs;

Sheriffs; but, for the reaſons already given, the competency of this devolution is called in queſtion.—In confining diſputes upon civil right to themſelves, the Law ſuppoſes a favour done by the Court of Seſſion to the ſubject; but the diſpoſing of juriſdiction to others, is a very different matter: And tho' it is ſtill in the power of the parties to be heard by the Supreme Court, upon a complaint againſt their ſentence, yet that circumſtance bears hard upon the defender, who, by eſtabliſhed law, was entitled to be brought before the Court of Seſſion in the firſt inſtance. He lies under this additional and moſt material hardſhip, that a ſingle Judge, in the vacation, may ſhut the door of the Court againſt him, by refuſing his bill of advocation or ſuſpenſion.

It was a long time before leaſes of land were conſidered to be of any conſequence or value, diſtinct from the convenience of the tenant, and the affection which he entertained to the ſpot of his reſidence. The land was generally looked upon, by our Judges, to be worth no more than the rent, and, in corn-farms (ſet at the rate of the country) could only exceed it from real improvements, which it is well known, in Scotland, were very ſlow in their progreſs.—From this circumſtance, the Judges, notwithſtanding the Statutes in favours of tackſmen,

conſidered

conſidered leaſes of common endurance, as rights of no great importance: And hence it happened, that when a tenant allowed arrears to become due, his Maſter had little to do, but to alledge that he was *vergens ad inopiam;* and to bring an action for obliging him to find caution for the arrears, and for the rent in time coming, otherwiſe to *remove.*—From the courſe of deciſions on this point (and there are many) it is too certain, that great oppreſſion and injuſtice were committed, under the ſanction of this idea, upon the poor tenantry of this country, whoſe leaſes were thereby rendered very precarious titles of poſſeſſion.

The arrears required to found this action, were generally *two terms*, or *one full year*, tho' the Court ſometimes varied, according to circumſtances. This proceſs, like the former irritancy, being a remedy of a nature ſtill more extraordinary, was confined to the Court of Seſſion, and is alſo *given up to the Sheriff.*—Upon a practice ſo ſevere, drawn from the ideas of Roman Maſters, this clauſe of the Act of Sederunt is founded. —The caution formerly in the arbitriment of the Judge, is indeed limited to five years; which is an alteration of little conſequence, as caution is ſeldom or never to be expected on theſe occaſions. The Act adds another, and I think a better cauſe for the demand, *viz. the deſertion*

of

*of the farm*; which, in common law, and common ſenſe, has always been looked upon to be a dereliction of the leaſe. The words are, 'Or ſhall 'deſert his poſſeſſion, and leave it unlaboured 'at the uſual time of labouring.'—A man may leave all or part of his lands unlaboured, without deſerting his poſſeſſion—a diſtinction which ought to have been made by the Act. And, in practice before the Sheriff, the Solicitors-at-Law ſeem to think it neceſſary to conjoin this kind of deſertion (*i. e.* leaving a part of the lands unlaboured), with the arrear of rent, in order to give relevancy to their lybel. — In Dr Boyd's Judicial Proceedings *, we have the form of the ſummons, which not only ſtates the arrear being due, but alſo that the defender has deſerted his poſſeſſion, and ſuffered part of the farm, *viz.* a *field, to lie unlaboured*.—By the letter of the Act of Sederunt, it is ſufficient to libel the arrear, *or* the deſertion.

Thus the practice carries a degree of ſeverity ſomewhat inconſiſtent with the manners of the times, and which may often be abuſed to the purpoſes of oppreſſion, contrary to the principles and intendment of the Act of Sederunt. If the tenant is induſtrious, his leaſe ſoon becomes a valuable property, of which he ought not to be deprived upon light grounds. A bad ſeaſon

* Page 242.

ſeaſon, or other misfortunes incident to rural buſineſs, may oblige an induſtrious man to run two terms, or one year, in arrear; and a tract of hard weather in the Winter, may afford a pretence that his lands lye unlaboured, and give a bad maſter an opportunity of oppreſſion.

I remember a caſe, where all I have ſaid literally happened,—where this very clauſe in the Act of Sederunt was perverted to the purpoſes of oppreſſion.—Nicol Brown held a farm under the late G—— L——— of C———, Eſq. The Harveſt 1757 proved remarkably wet, ſo much ſo, that Nicol Brown, and the other tenants, had been unable to get their victual led home, and their ſtacks covered, ſooner than Martinmas. Mr L——— gave Brown a charge of horning upon the term-day, and refuſed a large partial payment of the rent. A violent froſt ſucceeded this wet weather, and continued late in the ſeaſon.—This afforded a pretence, that the lands were *unlaboured*. C——— brought his action before the Sheriff, upon this laſt clauſe of the Act 1756; obtained a decreet, and turned the principal tenant, and fifteen families of cottars, out of doors, in a ſevere ſtorm of ſnow. Three * of the neighbouring ſubſtantial tenants, from compaſſion to the poor people, took the farm for that year, though the ſeaſon was far advanced;



* Meſſ. Thomas Hodge, Peter Baillie, and Peter Hay.

ced; reſtored the houſes to the inhabitants, and, though theſe inhabitants *had been removed for leaving the lands unlaboured*, the new poſſeſſors cleared one hundred pounds of profit, and beſtowed it on the ſufferers.

To the honour of the late Lord Hopeton, it ought not to be forgot, that he, inſtead of adding to the ſeverities of the ſeaſon, gave his tenants in the ſame neighbourhood, not only an eaſe of their money payments, but was pleaſed to credit them for their victual-rents till the next ſeaſon, which proved a plentiful one *.

Brown, the tenant, at laſt ventured to bring L——— of C——— into Court, to anſwer for a ſcene of oppreſſion committed under colour of the Act of Sederunt 1756.—He defended himſelf upon the powers thereby given to proprietors, and upon a ſtrict conſtruction of that new law. The Court, juſtly offended at the perverſion of their Statute, to the ruin of the innocent, and the deſtruction of the tenantry, branded the defender with a judgement expreſſive of their feelings, and fined him in damages and expences to the extent of L. 500 Sterl.

This material judgement, which reflects honour upon the juſtice of the Court, and light upon this fifth clauſe of the Act 1756, is not to be found in the printed collection of deciſions!

* This circumſtance came out in evidence in the caſe here mentioned.

ſions!—The inference from this caſe is, That an action of ſuch conſequence, ſo capable of being abuſed, and which requires ſo much regularity in the procedure, ought not to have been committed to the hurry, confuſion, and inaccuracy of Sheriff Courts.

To this the misfortune of C——'s tenants was ſo far imputable: He could not have obtained a decree ſo irregular and informal in the Court of Seſſion. No extractor would have given it out, even in abſence.—When actions are brought by the Maſters, your employers, upon this clauſe, let me adviſe you to be attentive to give the tenant a proper opportunity of paying the money, or of finding his caution. Hurry nothing forward; nor take advantage of the forms, tho' in ſtrictneſs they ſhould admit it.—If the action lies upon alledged deſertion, or neglect of labouring, let the proof be full, explicit, and ſatisfactory, whether the defender appears or not. A ſingle field, as the Sheriff's libel mentions, lying untilled, is by no means ſufficient.—Thus you will avoid diſagreeable challenges of oppreſſion and damages againſt your employer, more of which have been occaſioned by this clauſe, than all the other parts of the Act.——When we come to the Engliſh procedure in this buſineſs, I ſhall have the ſame ground to go partly over once more, and there-

fore will reſerve what I have further to remark for that occaſion; one circumſtance excepted, which I think belongs to this part of our diſquiſition.

The ſtipulated terms for payment of rents in corn-farms, are generally Martinmas and Whitſunday; but, for centuries paſt, it has been the practice to delay the payment till Candlemas and Lammas, the three months being allowed to threſh out and diſpoſe of the produce; and this indulgence has even, from analogy, found its way into burghs, though the reaſon does not apply.—Now, by the words of the Act of Sederunt, a proceſs may be brought immediately after the term in the tack, when the tenant has not touched a ſhilling of the crop; and this was the caſe of L——— and Brown, already ſtated.

We ſhall now ſuppoſe that the tenant does *find caution*.—The form in which the cautioner binds himſelf, is by an enactment in the Sheriff's books, in the following terms—

'At Edinburgh, the day of May 1782 'years. The which day, compeared A. B. and, 'in conſequence of a precept of removing pre'ſently depending before the Sheriff of Edin'burgh, at the inſtance of C. D. againſt E. F. 'he the ſaid A. B. judicially enacts, binds, and

'obliges

'obliges him, his heirs, executors and ſucceſ-
'ſors, as cautioner and ſoverty acted in the
'Sheriff-court books of Edinburgh, for the ſaid
'E. F. That the ſaid E. F. as principal, or he
'the ſaid A. B. as cautioner, ſoverty, and full
'debitor with and for him, ſhall make payment
'and deliverance to the ſaid C. D. his heirs,
'executors or aſſignees, of what rents, or ar-
'rears of rent, kain and carriages, are due and
'reſting to the ſaid E. F. for the room and
'lands, &c. *(Here the lands are ſpecified as in the*
'*lybel)* and that for crop and year 1780; as
'alſo, that the ſaid E. F. as principal, or he
'the ſaid A. B. as cautioner, ſoverty, and full
'debitor for him, ſhall content, pay, and de-
'liver to the ſaid C. D. or his foreſaids, the
'ſum of according to the condi-
'tions of the tack as to the rent, kain or car-
'riages, and yearly, and for each of the crops
'and years 1781, 1782, 1783, 1784 and 1785,
'and that in manner, and at the terms follow-
'ing, *viz.* *(Here the terms of payment of the year's*
'*rent for* 1781, *and delivery of the kain and car-*
'*riages for that crop and year, are inſerted.)* and
'ſo furth yearly and termly thereafter, at the
'ſaid reſpective terms during the years afore-
'ſaid, with a fifth part more of liquidate pe-
'nalty for each term's faillie in payment of the
'money rent, in terms of the ſaid tack.'

In

In the libel upon theſe removings, the Act of Sederunt is always ſpecially recited as the authority for the action. This is right and neceſſary, otherways a proceſs of removing brought upon other *media*, might at any period be inverted into a ſuit upon the Statute.—Thus, in a caſe 4th July 1764, a proceſs originally libelled upon a common warning, was attempted to be changed into a removing upon this Act, in regard that a libelled ſummons, called in the Court 40 days before the term, was thereby declared equivalent to a warning. The defence was a plain one.—'If an action be brought 'upon the Act, it muſt be *libelled on*, which 'was accordingly *ſuſtained*.'

This part of the Act of Sederunt gives ſo great an advantage to parties who bring their actions before the Sheriff, that they ought in no caſe to be brought before the Lords in the firſt inſtance.

6th Clauſe. 'THE Lords hereby enact and declare, That 'no bill of advocation or ſuſpenſion of a de-'creet, or proceſs of removing, be paſt, other-'ways than by three Lords in time of vacance, 'and by the whole Lords preſent in time of 'Seſſion; provided always, that, in vacation-'time, and when three Lords cannot eaſily be 'found, it ſhall be lawful to the Lord Ordinary

'on

'on the bills, upon ſuch bills of ſuſpenſion, to 'grant ſiſts from time to time as he ſhall judge 'proper, to the end that the complainer may 'have acceſs to preſent his bill of ſuſpenſion to 'three Lords, or to the Court. And they here-'by ordain, That, upon paſſing ſuch bill of 'advocation or ſuſpenſion, or at leaſt within 'ten days after the date of the deliverance there-'on, the complainer ſhall be obliged to find 'ſufficient caution, not only for the implement 'of what ſhall be decerned on the advocation 'or ſuſpenſion, upon diſcuſſing thereof, but alſo 'for damage and expence, in caſe the ſame ſhall 'be found due: and, upon the complainer's 'failing to find caution as aforeſaid, ſuch bill 'of advocation or ſuſpenſion ſhall be held to be 'refuſed; and it ſhall be lawful for the other 'party to proceed in his action of removing, 'or in the execution of his decreet, as if no 'ſuch bill of advocation or ſuſpenſion had been 'preſented or paſt.'

Thus acceſs to the Superior Court is rendered a matter of difficulty, and loaded with conditions which cannot often be complied with by tenants. A ſingle Lord may refuſe the bill; but, to admit it, required three. When a decree is obtained againſt a party, a preſumption of wrong is created againſt him; and he is refuſed the advantage of being heard by a Superior

Judge,

Judge, unleſs he aſſures his opponent of payment in the end, by finding caution in Court. But an advocation is a removal of a queſtion not determined by the Judge; and there being no preſumption againſt the purſuer of it, no caution is requiſite. Here the Lords have confounded the diſtinction in favour of *Landlords*. —The circumſtance of three Judges being neceſſary to the paſſing of a bill, was ſoon found to be very inconvenient to the parties, and diſtreſſing to the Court itſelf: And therefore, the Lords, by a ſubſequent Act of Sederunt, of date 10th Aug. 1776, ordained, 'That any *two* of their 'number ſhould have power and authority to 'paſs bills of ſuſpenſion and advocation of de-'creets of removing, when they ſhould find 'cauſe ſo to do.'

The caution is appointed to be taken for damages and expences, beſides the ſums contained in the advocation and ſuſpenſion.—All bonds bear damages and expences above the extent of the charge. By this is meant violent profits; and this clauſe hangs an additional terror over the head of our country-people.—The bond, therefore, taken upon this occaſion, differs in no part of the ſtile from other bonds in ſuſpenſions, but that of taking the cautioner bound, that the tenant ſhall remove, 'and pay what-'ever ſum of damages and violent profits ſhall 'be found due, in caſe of wrongful ſuſpending.'

A bond of this kind muſt be exceedingly difficult to be obtained by tenants who have few relations.—If it is not found, it behoves the tenant to yield his all up, *right* or *wrong*.

'THE Lords do enact and declare, That, in all Removings, whether originally brought before this Court, or by advocation or ſuſpenſion, they will proceed and determine the ſame ſummarily, without abiding the courſe of any roll: And ordain this Act of Sederunt to be recorded in the books of Sederunt, and printed and publiſhed in the uſual form.' 7th Clauſe.

This is a very proper reſolution, and directly within the powers of the Court, for making regulations to expedite juſtice.——In common actions of removing, the rolls were always diſpenſed with; and, by this article, advocations and ſuſpenſions of removing are put upon the ſame footing.

I have entered into a minute conſideration of this moſt remarkable Act of Sederunt, becauſe it ought to be perfectly underſtood, and rendered very familiar to all practitioners.

All this intricate buſineſs of removing may be prevented in a very ſimple manner.—The term of the leaſe may be made one or two years more than the parties intend it ſhould ſubſiſt. For theſe laſt years, the leſſee may be bound to pay

*double rent*, under an option to remove at the intended term of expiration; or elſe, the tenant may be bound to flit at a term ſpecified, and to pay ſo much more if he does not. Either of theſe methods would be effectual, as conventional clauſes are now literally executed by the Court; but the firſt appears to be preferable, as carrying a leſs penal appearance than the other.

I had almoſt omitted to inform you, that the warnings upon the Act 1555, were antiently kept hanging over the heads of the tenantry for years, and removings ſuddenly inſiſted for. By theſe means, they were rendered, literally ſpeaking, tenants-at-will; and the inconvenience argued upon by Lord Kaims, muſt have been ſeverely felt.—This abuſe certainly became common, ſince we find an Act of Parliament in 1579, made in order to remove it.

'*Item*, It is ſtatute and ordained be our Soveraine Lord, with advice of his three Eſtates in Parliament, That all Actions of Removing be perſewed within three zeirs after warning; with certification and they failzie, the warneris ſall never be heard thereafter to perſew the ſamin upon that warning*.'

In a queſtion upon this Statute, the Lords found, that the preſcription began from the time to

* Cap. 82.

to which the tenant was warned, and not from the date of the precept.

The new actions of removing introduced by the Act 1756, are declared equivalent to the former warnings.—This preſcription, then, I preſume, will henceforth run from the terms at which the tenant is concluded againſt to remove.

## BURGAL REMOVINGS.

THE inhabitants of burghs were originally an aſſociation of tradeſmen, mechanics, or traffickers, without any mixture of ſtrangers. It was requiſite that all of them ſhould be *Burgeſſes*, intereſted in the defence of the town, and ſubject to a ſhare of public burdens. To aſcertain this intereſt, it behoved each burgher to acquire a *bigged land* within a year and a day after his entry.—This property made his ſolid qualification; and if the land was waſte, or *unbigged*, he was obliged to rebuild it within a twelvemonth *. Afterwards, this qualification was fixed to the property of a rood of land, which paid 5d. of burrow-mail to the King.

You may remember, that burghs-royal are, *inter regalia*, held of the Sovereign, for burgal ſervices; and that the Magiſtrates are only his

 Officers,

* Leg. Burg.

Officers, appointed for the civil government, and the adminiſtration of the revenues. The burghers, therefore, are upon equality; none of them have any ſuperiority or pre-eminence over their neighbours, or are capable, by themſelves, of doing any act, or exerciſing any power within the juriſdiction of the place—a circumſtance favourable to trade, and creative of ideas of liberty and independence.—Among the many privileges beſtowed upon burghs from time to time, the moſt remarkable was, That burghs were amenable only to their own Courts. They were not bound to anſwer the ſummons of any other officers, but thoſe of their Magiſtrates, in civil actions; and none but theſe officers could, under the inſpection of the Bailies, poind one inhabitant for a debt due to another.—'It is ordained (ſays Balfour) That 'no officer ſhall poind any perſon, indweller of 'any burgh, but the Provoſt, Bailies, and their 'officiars;'—and, in ſupport of this rule of *Leges Burgorum*, he quotes a deciſion, 9th July 1538.

As the houſes within burgh, were, without exception, the property of the burgher-inhabitants, we find, in our antient laws, no rules reſpecting the *Removings of Tenants;* but we find many which regard the violent diſpoſſeſſing them from their rights, or, as it is termed, *de-*

*forcement*

*forcement within burgh.* The principal of theſe Laws, is the Statute of Robert I. which enumerates the grounds of ſuch deforcements or ejectments. The remedy was the ſame as in England—the action already mentioned of *nouvelle diſſeiſine.*

So jealous, ſo contracted in their ideas, were the inhabitants of our antient burrows, that, in place of ſetting their houſes to ſtrangers, they refuſed even to lodge them above 24 hours *.

Afterwards, when manners altered, and people from the country choſe to reſide in towns for convenience and defence, houſes and chambers came to be *let* by the proprietors, for the purpoſes of habitation.—The property devolved to ſtrangers, who were not inhabitants; and ſimple reſidence, joined to actual trade, were held to be qualifications ſufficient to entitle to the freedom of the burgh.

As warning to remove is an act of juriſdiction, no inhabitant was entitled to exerciſe it, becauſe he had no ſuperiority over his neighbour; and therefore he applied to the Magiſtrates for a warrant to their officers, to warn by public authority; and we learn from Craig, that ſuch was the eſtabliſhed practice in his time.—'In burrows (ſays he) it is ſufficient 'if the public officer, authoriſed by a verbal 'mandate

* Leg. Burg. c. 90.

' mandate from the Bailies, forty days before ' Whitſunday, warned the tenant of the houſe ' to remove. This warning needs not to be ' ſerved, either perſonally, or at church: if it be ' done at the houſe itſelf, it is ſufficient: and ' if nobody is to be found, that a mark of the ' notification ſhould be affixed; for it would be ' improper that the owner of an urban tene- ' ment ſhould be put to the trouble and charges ' of ſearching for the inhabitant, wherever he ' might chuſe to withdraw *.'

Thus removings within burghs were never held to come under the Statute 1555; and, in one or two caſes, the Lords even ſuſtained warnings within leſs than 40 days of the term.

The authority of the Magiſtrates, however, continued to be required; and the form in practice was, that the officer who was employed, *chalked his name* upon the moſt patent door of the houſe, and returned a certificate or execution of the fact.

In order to eaſe themſelves of the burden of particular applications, the Magiſtrates of moſt towns, and particularly thoſe of Edinburgh, in the beginning of each year, gave a general warrant to their officer to execute warnings, at the deſire of every heretor who might employ them: and, from that time, the Bailies were no further

* Page 269, § 9.

ther troubled upon this head.—In many ſmall burghs, however, I am informed that the rule continues to be ſtrictly obſerved. The Magiſtrates are jealous of their authority, and chuſe not to part with an *iota* of it.—In Edinburgh, ſo late as the 1709, a warning was objected to, upon account of the want of the Magiſtrates warrant. But the Lords *repelled the objection*:—'In regard that, as a precept under a Maſter's 'hand is ſufficient to remove tenants from 'land in the country, an heretor's verbal order 'to an officer within burgh, where verbal or-'ders are in practice, is ſufficient, without the 'the warrant of a Bailie;' and no other account of this matter is given by Lord Bankton or Mr Erſkine.'

If the forms in common practice were more attended to by our Syſtematic Writers, they would not remain ſo much in the dark for the *rationale* of many parts of the Law.—Attend to the execution every day, returned by officers in burgal removings——

'Upon the day of 1778, I A. one 'of the town-officers of Edinburgh, paſſed at 'command and deſire of B. proprietor of a 'lodging or dwelling-houſe and pertinents ly-'ing at the croſs of Edinburgh, and preſent-'ly poſſeſſed by C.; and, by virtue of the ſaid 'B. his order, *in his Majeſty's name and autho-*

'*rity*,

'rity, *and in name and authority of the Lord Pro-*
'*voſt and Magiſtrates of Edinburgh*, lawfully
'warned and charged the ſaid C. to flit and re-
'move himſelf, wife, bairns, ſervants, ſubte-
'nants, goods and gear, forth and from the
'ſaid lodging or dwelling-houſe, and perti-
'nents thereto belonging, and to leave the
'ſame void and redd at the term of Whitſun-
'day next to come, in this preſent year 1778,
'to the effect the ſaid B. or others in his
'name, may enter thereto, and peaceably poſ-
'ſeſs, bruik, and enjoy the ſame in time com-
'ing thereafter; with certification, *&c.*—This
'I did, by *chalking the moſt patent door* of the
'ſaid dwelling-houſe, as uſe is within bo-
'rough; as alſo made intimation of the ſaid
'warning to the ſaid C. perſonally apprehend-
'ed, before and in preſence of D. and E. alſo
'both officers of the ſaid city *.'

This warning, you will obſerve, is extremely different from the precept of a country heretor. It is done *in his Majeſty's name and authority, and in the name and authority of the Lord Provoſt and Magiſtrates of Edinburgh.* But no man was entitled to uſe theſe names, without liberty aſked and given.—Thus the form, of itſelf, gives compleat evidence of the true origin of this urban ceremony.—The words of the execution, 'By 'virtue

* Boyd's Jud. Pro. p. 329.

'virtue of the ſaid B. his order,' are improper in themſelves, and rather uncivilly placed, *i. e.* before the authority of the King and Magiſtrates.—The execution ſhould be thus: 'In 'compliance with the ſaid B. his requeſt, in 'his Majeſty's name and authority,' &c.

The officer, it is believed, at preſent chalks any figure he pleaſes upon the door.—If the tenant does not remove, a complaint is given in to the Bailies, which the practitioners term a *Summons of Removing*. The ſummons in Edinburgh, as I am informed, is written in the chamber of the Solicitor; and the parties are cited upon it, without even the ſignature of the Clerk of the Court, or any other warrant: than which nothing can be more looſe, or adverſe to every idea of judicial procedure. — It is ſummarily called, and decreet given for removing and expences; upon which a warrant of ejection follows, but not till a charge of ſix days upon the decreet be expired — a circumſtance attended with great inconvenience, and abſurd in the extreme.

In country removings, ejections may be executed, as you have heard, the third day after the term of Whitſunday.—In tenements within burgh, each town is regulated, in this reſpect, according to its cuſtom, and order of its Magiſtrates.—From a deciſion of the Court of Seſſion

in 1670, it appears, that a ſlovenly practice prevailed in Edinburgh, of tenants remaining in their houſes no leſs than *ſix weeks* after the term of Whitſunday. But now the time is ultimately fixed to the 25th of May, at 12 o'clock, when the warrant of ejection may be executed; for, if one obſtinate perſon is allowed to tranſgreſs in this particular, great inconvenience and diſtreſs enſues to many, who depend upon admiſſion to each other's houſes.

The form of the warrant iſſued upon theſe occaſions, is in theſe words:—'At Edinburgh, 'the day of . Which day, 'John Grieve, Eſq; Bailie, ſitting in judgment, 'compeared J. B. officer, who made faith, 'That he had lawfully charged the before-de'ſigned A. B. to flit and remove himſelf, bairns, 'lodgers, goods and gear, furth and from the 'foreſaid dwelling-houſe and pertinents, and 'inſtantly to leave the ſame void and redd, to 'the effect the purſuer, or others in his name, 'may enter thereto, and poſſeſs the ſame in 'time coming, conform to the foregoing de'creet, and execution thereof; which he fail'ing ſtill to do, therefore the Bailies grant 'warrant, and ordain the officers of Court, to 'paſs *with a Clerk of Court*, to the houſe before 'mentioned, and *inventary*, eject, and throw 'out the ſaid defender, and his whole goods

'and

'and effects therefrom, and put the purſuer in 'poſſeſſion of the ſame, conform to the fore-'going decreet, and execution thereof, in all 'points.'

Hence we ſee that the ceremony of ejection is the ſame both in town and country, *viz.* 'The extinguiſhing of the fires, putting out 'of the furniture, and delivering the keys to 'the new tenant.'—In towns, the clerks of Court attend the officers, and make a liſt of the furniture ejected, to prevent all after-alledgances of embezzlement.

The titles in removings within burghs, are the ſame as in prædial farms: the faſine of the warner muſt be libelled, and produced, in all caſes where the poſſeſſion of the tenant is derived from a different perſon: and though the Lords have, as already mentioned, in ſome caſes, ſhown an inclination to ſhorten the time of the warning, the forty days are now eſtabliſhed by conſtant cuſtom in moſt towns in Scotland. Of late, the Court have gone further; they have in a manner diſmiſſed even the remainder of form in burghs. By a deciſion 23d July 1766, *Tait* contra *Sligo*, they have found it unneceſſary to chalk the doors, by or without orders of a Magiſtrate, 40 days before Whitſunday; and that a verbal intimation is ſufficient, if the tenant acknowledges it.

Every body knows, that *this chalking ceremony*, light as it is, preſerves a ſurpriſing regularity within burghs, in the affair of removing. If it is aboliſhed, and the buſineſs truſted to the verbal intimation of parties, the confuſion conſequent upon the neglect, will ſoon evince the value of the form, which upon no account or equipollent ſhould be diſpenſed with. In imitation of royal burghs, the ſame uſages have taken place in burghs of regality and barony; and the Court has approved of them, in all caſes where the houſe was the principal object, unconnected with land.

The reaſon for Whitſunday-removings, in country-farms, does not apply to burgal tenements; and therefore, where the tack of a houſe expires at Martinmas, or any other term, the Lords have found, 'That the tenant may be 'removed upon a warning of 40 days preced-'ing ſuch expiration.' *Nov.* 21*ſt*, 1671, *Riddel.*

## EJECTMENT (*or* REMOVING) *in* ENGLAND.

THE ſame Laws and Forms having, at the earlieſt periods to which hiſtory reaches, prevailed in Scotland, which yet remain in the South, I was obliged to enter occaſionally upon part of the Engliſh Practice, in order to throw

neceſſary

neceſſary light upon our own. The ſubject, however, cannot be properly concluded, without an attempt to give you a more particular and diſtinct account of this branch of buſineſs, as it is now executed in England.

You may remember, that leaſes in that country, though only for a certain term of years, were originally, and ſtill are, granted in a form equally ſolemn, and under clauſes ſimilar to a charter of the property. And the ſtyle of all the writs and proceſſes, evidently ſuppoſes that the leſſee by poſſeſſion has acquired *an eſtate*, which, from a chain of legal incidents, came to be regulated in the ſame manner as if an actual property had been veſted in him.—For all proprietors in England, holding under Lords paramount, or, as we term them, *Prime Superiors*, are known by the general name of *Tenants*, and they are only diſtinguiſhed by the nature of the eſtate in the land; and hence the tenant in *fee-ſimple*, *tenant in tail*, for *life*, or *tenant for term of years*.

If, during the ſubſiſtence of a leaſe, the leſſee, or any perſon in his right, ejected the tenants, then the Law afforded him relief, by various brieves ſuited to the nature of the caſe*. Leaſes, however, in effect, were long no more than perſonal

* This was imitated by a Statute of our Robert I. in Scotland, mentioned above.

perſonal contracts, in England, as well as in Scotland.—The law afforded ſeveral methods of defeating them; and, therefore, leſſees, by theſe brieves, ſometimes recovered both the *poſſeſſion* of their farms, and damages; ſometimes damages only, according to the title or ſituation of the perſon by whom the ejection was committed. At laſt, when theſe rights were held to be good againſt every perſon whatever (or, as we ſay, againſt ſingular ſucceſſors) the juſtice obtained came to be compleat, *viz.* Re-inſtatement in the poſſeſſion, damages and coſts; and a proprietor diſpoſſeſſed, was entitled to be reſtored by the poſſeſſory mode of *nouvelle diſſeiſine*.—The ſame proceſs was awarded in eſtates by Statute, and elegit (*i. e.* adjudication) though ſuch eſtates were only chattle intereſts. —Leaſes were alſo chattle intereſts; and the proceſſes for recovering theſe ſeveral eſtates, were of the ſame nature. The tenant, if put out of his poſſeſſion, or ouſted*, had anciently the Writ of covenant, the *Ejectione firmæ*, the *Quare ejecit infra terminum*, and, laſt of all, the preſent Action of Ejectment, or, as with us, Ejection and Damages. But when the leſſee was allowed to poſſeſs, quietly, the whole of his term, then his eſtate came to an end; and, therefore,

* *Ouſt*, from the Norman word *Oſter*, to remove or diſpoſſeſs. *Oter* in modern French.

therefore, the Lord remained at liberty to re-enter upon the lands, and to *ouſt him*.—This, of old, was literally executed. All the brieves in Chancery carry the proof of it *in gremio*, to this day. All ouſters and ejectments are ſaid to have been executed *vi et armis*; and hence it is plain, that the ſame barbarous mode of removing ſubſiſted originally over the whole iſland.

Afterwards, when civiliſation had baniſhed theſe modes of violence, a tenant refuſing to give up his poſſeſſion, or, as the Engliſh term it, *holding over his term*, was conſidered as a wrong-doer, a *diſſeiſer* or *deforcer* of his Lord, by keeping him out of his property; and therefore, to procure juſtice, the Lord entered upon the land, and brought his action of ejectment and treſpaſs in the manner immediately to be deſcribed.—The expeditious and eaſy proceſs in this action, compared with the heavy, chargeable, and difficult motion of real actions, induced practitioners to bring queſtions of land-right under the poſſeſſory form of ejectment.—In real action, ſuch as our Declarator of Property, the whole depends upon the *title* of the parties claimants. So does the event of an ejectment; for, if the diſſeiſor has not a better title to the lands than the *diſſeiſed*, he muſt ſubmit, and *vice verſa*. But the original purpoſe of the aſſiſe of *nouvelle diſſeiſine*, and all its progeny,

was,

was, to recover *poſſeſſion only*, without regard to the titles; and the queſtion remained, how to try the right to the freehold itſelf, under the form of an action, which apparently had no more than the bare poſſeſſion for its object.—This, in the language of our Law, would be, to make the *proceſs of ejection and intruſion* produce the ſame effect as the *declarator of property*. But a proprietor or freeholder, whoſe lands were in the poſſeſſion of another, whether by tenantry or otherways, could not be *diſſeiſed* of the real poſſeſſion which he had not:—he could only be diſſeiſed of the *right of property*; and, therefore, was obliged to recover by the real actions preſcribed by the Law.—This he wanted to avoid, and therefore was under the neceſſity of uſing a device for that purpoſe;—he entered upon the land, and took poſſeſſion, as you have heard, *ſymbolically*.—The figurative poſſeſſion was ſufficient to entitle him to grant a leaſe to another, which he accordingly ſigned, ſealed, and delivered upon the ſpot.—This leſſee having no other eſtate in him, but the *leaſe* or *right* to the poſſeſſion, had a title to bring the *poſſeſſory action* as ſoon as he ſhould be *diſſeiſed*. He, therefore, remained upon the land till the tenant actually in poſſeſſion ſet him off, or *ouſted him*.—That this perſonage might not wait too long before receiving the injury wanted, a third

was generally prepared, who handed him off the land directly. This useful impertinent was termed the *Casual Ejector*, and against *him* the pretended Lessee brought his writ of injury and ejectment: so that, by this farce, solemnly ridiculous, the real possessor or proprietor might have been dispossessed of his property, without knowing any thing of the matter; for such must have been the effect of the judgment, if recovered.—But here the Court interposed by a *standing rule*, That unless the writ was brought against the actual possessor, due notice of the trial must be given to him. In compliance with this, the casual ejector writes the real tenant *a letter*, informing him, 'That such an action is brought against him: that he has no 'business with the lands, and no intention to 'defend them; and therefore, if he the tenant 'does not appear for his interest, judgment will 'go, and the possession be lost.'

This done, the *casual ejector* marches off: the real tenant appears upon the stage; and, by another rule of Court, is admitted to state himself defender.—It then behoved the plaintiff-lessee, in the *first* place, to show the title of his author or lessor, and to bring distinct evidence of the *entry*, the *lease*, and the *ouster*, before he could open his mouth in the cause.

This mummery not only became tireſome and expenſive, but, like all preliminary ceremonies, afforded arguments of *no proceſs*, or, as we term them, *dilatory exceptions*.—At laſt, Lord Chief Juſtice Rolls, in the reign of Charles II. chaſed away the fictions of the field, by conjuring one up in the Court itſelf. The Chief Juſtice ordered that this indulgence ſhould be given to the real tenant, only *upon condition*, that he, *qua* defendant, judicially confeſſed, that the *entry*, the *leaſe*, and the *ouſter*, had all been ſolemnly performed, altho' not one of them ever exiſted. This confeſſion is minutely reduced into writing with all the air of a *res geſta*, and intitled, *The common rule by conſent in ejectment*; and thus, as in the amuſement of the Italian ſhades, one giant ſhadow ſwallows up the reſt.

The Lord Chief Juſtice might do as he pleaſed; but our friends, the attornies, did not underſtand raillery upon the ſubject. They have carefully preſerved every one of theſe fictitious perſonages, who, together with all that they *did*, and all that they *ſaid*, are to be found fully written down in the proceſs even to this day *.

The

* An obſervation of Lord Kaims, upon a different occaſion, may be, with much propriety, here applied.—'Thus (ſays his 'Lordſhip) by ſtrictly adhering to forms, without regarding 'ſubſtance, Law, inſtead of a rational ſcience, becomes a heap 'of ſubterfuges and incongruities, which tend inſenſibly to cor-'rupt the morals of thoſe who make Law their profeſſion.

The preliminaries being all adjuſted, the only queſtion remaining before the Court, turns upon the *title* of the real parties, *i. e.* of *the leſſor or the plaintiff claiming the poſſeſſion*, and that of the defendant *holding it*, which of conſequence determines the *right of property*; and thus a poſſeſſory action is made to have the effect of a *real* one, or, as we would ſay, a proceſs of ejection and intruſion is rendered equal to a declarator of property.—But the proceedings in theſe actions differ not ſo very much, either in form, expence, or duration, as to induce us to ſubſtitute the one for the other.

It may be thought I have been too particular in this deſcription; but you will find, in the ſequel, that it was neceſſary to be thus explicit. Beſides, an idea of theſe things is of the greateſt uſe, in running the parallel between many others of the Scottiſh and Engliſh forms, which is a part of the plan of theſe Lectures.

Thus, then, the removal of tenants in England, is a matter of as much ſolemnity, as the trial of the right of property of the farms poſſeſſed *.



* 'It is to be wiſhed, (ſays the Hon. D. Barrington) that 'the fictitious proceedings in the common action of ejectment 'were altered. No client can poſſibly be made to underſtand 'the reaſon of ſuch a fiction.—If it is anſwered, that there is 'no occaſion for his underſtanding it, I ſtill inſiſt that myſtery ſhould always be removed.' *Obſ. on the Statutes, p.* 117.

In Scotland, we had anciently no other mode of trial of the right of poſſeſſion, than that of the *Aſſiſe of nouvelle diſſeiſine*, which is the father of the Engliſh ejectment; and, from theſe forms, we may plainly diſcover the *rationale* of theſe parts of our Practice, which ſubſiſted at the time of the Act 1555, of *Balfour*, and of *Craig*. They were nothing more than the remains of thoſe laws, that, in the days of our Roberts and Davids, prevailed over the whole iſland.

A tenant by leaſe could not *then* be warned, till after the compleat expiration of his term: neither have the Lords in England any title to enter upon the lands, ſo long as the poſſeſſor's leaſe *ſubſiſts*. It is plain he could not be *diſſeiſed*, and therefore could not have an action.

The ceremony of removal in thoſe days, *i. e.* the Landlord's coming upon the ground, and breaking a *diſh*, was no other than the Engliſh *entry*, it being a part of the ceremony, to exhibit a ſymbolical mark of intention.

The Engliſh Lord, before he could *enter* and *ouſt* his tenants, muſt have had the right to the freehold compleatly veſted in him. The Scots Lord muſt have been infeft, and muſt be ſo at this moment, before he can inſiſt in a removing.

Thus

Thus have I endeavoured to give you a general idea of the Engliſh procedure in the matter of Ejectment.—We ſhall now purſue it in detail, in order to diſcover its correſpondence with *our own modern practice*. If the term of a leaſe expires, and no entry is made, or notice given by the Maſter, then ſuch tenant is ſaid to poſſeſs by ſufferance, *i. e.* by *tacit relocation*: But if the proprietor chuſes to have poſſeſſion of the land, then, upon expiration of the leaſe, or at any time afterwards, he enters upon the ground, and ſays, 'I here enter and take poſſeſſion of this land, and I deſire you to leave the ſame immediately, with your goods, family, and cattle.'—This is equivalent to our warning. It is notice of the proprietor's intention, and a declaration that the ſufferance is at an end; and that any poſſeſſion thenceforth held by the tenant, will be *wrongful*.

A memorandum of this fact is made and ſigned by the perſon who makes the entry, before witneſſes; which is exactly of the ſame nature with *our execution* of the *Precept of Warning*. If the tenant perſiſts in holding over, the Lord takes out the writ of ejectment.—The ſervice of the writ upon the caſual ejector, and the notice given by him to the real tenant, are equivalent to the *Proceſs of Removing* in Scotland.

Theſe

Theſe writs being all in eſtabliſhed words, the particulars of the caſe, whereby they are made to apply to the parties, are ſpecified in the form of a *declaration*, termed a *declaration in ejectment*.—' This muſt alſo (ſays Stair) have ' been ſo with us when brieves were uſed.' It now anſwers to our *ſummons* of removing; and, upon the point being tried, a judgment is given furth, attended with the ſame execution as our letters of ejection: but damages are ſeldom or never given in this action, becauſe it is looked upon as a matter of common form, and often tried by conſent of parties. An action of treſpaſs is, therefore, next brought againſt the tenant, for *recovery of the profits*.—We join theſe two in our proceſs concluding for ejectment and violent profits, in one libel.

Tenants in England, who have no leaſe, are termed tenants-*at-will*; and their intereſt is ſaid to be an eſtate *at-will*. So long, therefore, as the will of the Maſter continues, that tenant is preſumed to hold rightfully. The tenant, in the ſame manner, continues at his own will; ſo that either party may alter or determine this intereſt when he pleaſes, in the ſame manner as tenants by verbal leaſes may do with us after the expiration of the firſt year. The tenancy at will in England, was, for a long time, taken in a literal acceptation: either party might put

an

an end to it at any time of the year he choſe, at leaſt at any time at which the rents were uſually paid up, *i. e.* at the quarter, half quarter, *&c.* This, in practice, muſt have been attended with great inconvenience, and therefore the Law early interpoſed.—'If the Leſſee '(ſaith Littleton) ſoweth the land, and the 'leſſor, after it is ſown, and before the corn is 'ripe, put him out, yet the leſſee ſhall have 'the corn, and ſhall have free entry, egreſs 'and regreſs, to cut and carry away the ſame.'

The eſtate at will is, in this caſe, terminated by the declaration of the Maſter, and the crop is only carried off by tolerance of the Law.—On the contrary, if the tenant gave up, and thereafter ſowed the land, the crop would belong to the Maſter, for then he is conſidered as a diſſeiſor. For (ſays Lord Coke) 'If the Maſter en-'ters, the regreſs is a continuation of the free-'hold in him from the beginning.'—'The 'ſame thing happens (ſays Littleton) if a te-'nant for years, which knoweth the end of his 'term, doeth ſow the land, and his term ended 'before the corn is ripe, then the leſſor ſhall 'have the corn, becauſe the leſſee knew the 'certainty of his term, and when it would end.' '—Well ſaid, Littleton! (exclaims Lord Coke) "*which knoweth the end of his term*;" for, 'where the leaſe for years depends upon an

'uncertainty,

'uncertainty, as upon the death of a tenant 'for life, or of a huſband ſeiſed in the right of 'his wife, or the like, *there* it is otherwiſe*.'

From this caſe of tenancy-at-will, the reaſon is plainly diſcoverable, why, anterior to the 1555, tenants without written leaſes could be warned at any time, while thoſe who had them could not, till compleat expiration of their terms. —The former were tenants-at-*will*;—that *will* might ceaſe at any time.—And hence, too, the utility of the Scots Statutes appears in a ſeparate light. All diſputes reſpecting the improper removal of tenants-at-will, and the property of their crops, were at once prevented in Scotland, by the term of Whitſunday being fixed for all warnings, without regard to the termination of the will of any party. And the plain expediency of ſuch a meaſure, has eſtabliſhed almoſt the ſame practice in England:—'The Courts 'of Law (ſays Judge Blackſtone) have of late 'years leaned as much as poſſible againſt con-'ſtruing demiſes, where no certain term is 'mentioned, to be tenancies *at will;* but have 'rather held them to be *tenancies from year to* '*year*, ſo long as both parties pleaſe; in which 'caſe, they will not ſuffer either party to deter-'mine the tenancy, even at the end of the 'year, without reaſonable notice to the other†.'

When

* 1ſt Inſt. lib. 1. § 68. † Vol. II. page 147.

When the Engliſh Writers mention the crop of the tenants holding over, as belonging to the Maſter, they term it *emblements*, from an old French word *emblement de bled*, which ſignifies what we call *ſprung corn*, or *brairded corn.*

From all that you have heard, it is eaſy to conjecture, that, difficult as our removings were upon the Act 1555, theſe difficulties were nothing in compariſon to the ejectment of tenants in England. There the evil grew to a great head; inſomuch that, in the 1729, an Act of Parliament became neceſſary to regulate a matter of ſuch univerſal concern.—An act was accordingly paſſed, *Quarto Georgii Secundi*, c. 28. It is intitled, 'An act for more effectually pre-'venting frauds committed by tenants, for ſe-'curing to leſſors and land-owners their juſt 'rights, and to prevent frauds frequently com-'mitted by tenants.—Be it enacted by the King's 'moſt excellent Majeſty, by and with the advice 'and conſent of the Lords Spiritual and Tempo-'ral, and Commons, in this preſent Parliament 'aſſembled, and by the authority of the ſame, 'That in caſe any tenant or tenants, for any 'term for life, lives, or years, or other perſon 'or perſons, who are, or ſhall come into poſſeſ-'ſion of any lands, tenements, or hereditaments, by, from or under, or by colluſion 'with ſuch tenant or tenants, ſhall wilfully

'hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments, his or their agent or agents thereunto lawfully authorised; then, and in such case, such person or persons so holding over, shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled, out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, *at the rate of double the yearly value of the lands*, tenements, or hereditaments so detained, to be recovered in any of his Majesty's Courts of Record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty, there shall be no relief in equity.'

Here you will observe the very same devices to have been practised in both kingdoms.—Tenants, after process of removing them had proceeded great lengths, collusively introduced others into the possession.—Our common law remedied

remedied this. A decreet of removing, as before mentioned, is not obeyed with us, unleſs the poſſeſſion is left *void* and *redd*.

A demand in writing is, by this Act, directly to be made.—It is ſingular, that no preciſe time, like our forty days, ſhould have been fixed for ſuch demand.—In Scotland, the *quantum* of damages, or violent profits, continues in the arbitriment of the Judge. Here, it is at once fixed to double value; and Judge Blackſtone informs us, 'That it has almoſt put an end to tenancy by ſufferance, unleſs with the tacit 'conſent of the owner of the tenement*;' *i. e.* in other words, It has at once ſwept away the whole trouble, forms, delays, and inconveniences attending *the removal of tenants in England*. They are thus obliged to be more attentive to the delivering up of their poſſeſſions, than their Maſters are to the receiving them.

I muſt now deſire you to obſerve, that this capital improvement is brought about without infringing the ancient and eſtabliſhed forms, however ridiculous ſuch forms appear to ſtrangers.—The Engliſh are peculiarly jealous of unhinging any part of their ſyſtem; and, where the end can be attained by collateral means, it is a fixed rule with them, never to touch that fabric. The Statute we are conſidering, is a



* Vol. II. p. 151.

ſtriking example of this: It does not, like our Act of Sederunt 1756, introduce a *ſet of new forms;* it preſerves the old ones entire, and attains its purpoſe by a determinate penalty upon thoſe who ſhall venture to *abuſe the common law.* Thus the demand or notice appointed by the Act, is not of the nature of an entry by ejectment; for, if the tenant chuſes to continue at the double rent, or if the farm is really worth it, the tenant may poſſeſs until he be removed by the ancient formal proceſs *.

HITHERTO we have examined the Engliſh method of recovering the poſſeſſion from tenants only where the lands are held at will, or by ſufferance after the expiration of the leaſe, which are analogous to our ordinary or ſolemn removings upon the Act 1555.

We are therefore, in the *next* place, to take a brief view of the extraordinary removings, *i. e.* of removing before the expiration of leaſes, or other rights by which the poſſeſſion is held.—They are with much propriety termed *forfeitures.* Theſe forfeitures, then, are founded upon the ſame principles with our own; but we ſhall find that the application and execution of them, have been materially different.

When

* There is another good reaſon applicable to the preſent caſe.—The Legiſlature could not change the mode of removing tenants, without changing alſo the beſt method yet diſcovered, of trying queſtions of property.

When a tenant ran in arrear of rent, the Maſter anciently *diſtrained* his effects for it; which anſwers to the poinding of them with us, though there is a difference which I have noticed in another place: But if there were not effects ſufficient upon the land, it was conſidered as deſerted, and the Maſter had right to a writ termed *Ceſſavit*.—'*Ceſſavit* (ſays Juſtice 'Raſtall) is a writ that lies where my very te-'nant holds of me certain lands or tenements, 'yielding certain rent by the year, and the 'rent is behind for two years, and no ſufficient 'diſtreſs may be found upon the land, then I 'ſhall recover the land. But if the tenant come 'into the Court before judgment given, and 'tender the arrearages and damages, and find 'ſurety that he ſhall ceaſe no more in payment 'of the ſaid rent, I ſhall be compelled to take 'the arrearages and the damages, and then the 'tenant ſhall not loſe the land *.'

This writ is termed *Ceſſavit*, becauſe it ſtates that the defendant has ceaſed the uſual payment of his rent for *two years*, *per biennium jam ceſſavit*; and the action, like our reduction *ob non ſolutum canonem*, is directly borrowed from the emphyteutic forfeiture of the Civil Law †.

*The*

* Termes de la Ley.

† The Roman Law required three years, a neglect, *per totum triennium.*

*The writ* is authoriſed by two Statutes of the 1ſt and 13th of Edward I. But this forfeiture was known with us in the earlieſt periods of our juriſprudence; and it has been ſupported from the analogy of a Statute of James VI. regarding feu-rights.

The Roman forfeitures were introduced into England with reſtrictions.—The writ of *Ceſſavit* did not *lye*, or was irrelevant, if there remained a ſufficiency of goods, equal in value to the arrears, upon the land, open to the attachment of the Lord.—'*That the lands were open to diſtreſs*,' was a compleat defence; but if they were incloſed, ſo as no diſtreſs could be taken, the writ continued to lye, or be competent. Beſides the arrears of rent, the lands muſt have lain *two years freſh, or unoccupied*, to entitle the Maſter to the benefit of the *Ceſſavit*, which was attended with much nicety of form, and frequently defeated by bills in Chancery.

After fictitious ouſters and ejectments became common, and practically uſeful in the trial of the titles of all tenants and poſſeſſors of land without exception, the proceſs of *Ceſſavit*, like many others of the ancient *actions real*, was ſeldom heard of in the Courts.—A tenant in arrear came alſo to be conſidered as a *diſſeiſor:* for, if he kept poſſeſſion of another man's land, without paying him the ſtipulated rent, he no doubt

doubt diſſeiſed or diſpoſſeſſed the proprietor of his rent, or, in effect, of his lands themſelves; conſequently, he became guilty of a greater wrong or treſpaſs, than the Landlord could commit, by diſpoſſeſſing him of his term or leaſe*.

The proceſs by re-entry and ejectment, therefore, lay, or was competent; and unleſs the arrear was paid by the tenant in Court, the ejectment proceeded, and the leaſe was forfeited.—Of conſequence, it will at once occur to you, that the ejectment, in this ſhape, becomes equivalent to our reduction *ob non ſolutum canonem*.

In order to leſſen the trouble, delay, and expence of theſe proceſſes, clauſes of re-entry were deviſed by conveyancers, and inſerted in all leaſes, *i. e.* The Landlord ſtipulates, 'That in 'caſe of an arrear to an extent certain, being 'ſuffered by the tenant, he ſhall be at liberty to 're-enter to the poſſeſſion of the lands leaſed; 'and that the term ſhall, from that entry, 'ceaſe and determine.'—We formerly conſidered theſe clauſes under the ſubject of leaſes.—It is almoſt exactly to the ſame purport of our *brevi manu* expulſion. But the law of England prohibits all *brevi manu* proceedings; and therefore, the conventional power of re-entry gave not the leſſor much advantage, either in time, con-

* The ſimple non-payment of rent is termed an injury, by *ſubtraction*; and the remedy is by diſtreſs, or action of debt, when no forfeiture of the leaſe is intended.

convenience, or charges.—Still were the proprietors tied down to purſue the tedious proceſs of re-entry and ejectment, with ſome ſmall variations in their favour, drawn from the conventional allowance in the leaſes. — Here the *ejectment* again anſwers to our *declarator of irritancy* upon conventional clauſes.

A ſubſequent *proviſo* of the former Statute 4th George II. was intended to obviate theſe inconveniences.

'And whereas great inconveniences do frequently happen to leſſors and landlords, in caſes of re-entry, for non-payment of rent, by reaſon of the many niceties that attend re-entries at common law; and foraſmuchas, when a legal re-entry is made, the landlord or leſſor muſt be at the expence, charge, and delay of recovery in ejectment before he can obtain the actual poſſeſſion of the demiſed premiſſes; and it often happens, that after ſuch a re-entry made, the leſſee, or his aſſignee, upon one or more bills filed in a Court of Equity, not only holds out the leſſor or landlord, by an injunction, from recovering the poſſeſſion, but likewiſe, pending the ſaid ſuit, do run much more in arrear, without giving any ſecurity for the rents due, when the ſaid re-entry was made, or which ſhall or do afterwards incur: For remedy whereof, be it enacted

'enacted by the authority aforeſaid, That in all 'caſes between landlord and tenant, from and 'after the twenty day of June, One thouſand 'ſeven hundred and thirty-one, as often as it 'ſhall happen that one half-year's rent ſhall be 'in arrear, and the landlord or leſſor, to whom 'the ſame is due, hath right by law to *re-enter* 'for the non-payment thereof, ſuch landlord 'or leſſor, ſhall and may, without any formal 'demand or re-entry, ſerve a *declaration in* '*ejectment* for the recovery of the demiſed pre-'miſſes; or in caſe the ſame cannot be legally 'ſerved, or no tenant be in actual poſſeſſion of 'the premiſſes, then to *affix* the ſame upon the '*door of any demiſed meſſuage*; or in caſe ſuch 'ejectment ſhall not be for the recovery of any 'meſſuage, then upon ſuch *notorious place* of 'the lands, tenements, or other hereditaments, 'compriſed in ſuch declaration of ejectment; 'and ſuch affixing ſhall be deemed legal ſer-'vice, or affixing ſuch declaration of ejectment 'ſhall ſtand in the place and ſtead of a demand 'and re-entry; and in caſe of judgment againſt 'the caſual ejector, or non-ſuit, for not confeſ-'ſing *leaſe*, *entry*, and *ouſter*, it ſhall be made 'appear to the Court where the ſaid ſuit is de-'pending, by affidavit, or be proved upon the 'trial, in caſe the defendant appears, that a 'half-year's rent was due before the ſaid decla-

'ration was ſerved, and that no *ſufficient di-*
'*ſtreſs was to be found on the demiſed premiſſes*
'*countervailing the arrears then due*, and that
'the leſſor or leſſors in ejectment had power
'to re-enter; then, and in every ſuch caſe, the
'leſſor or leſſors in ejectment, ſhall recover
'judgment and execution, in the ſame manner
'as if the rent in arrear had been legally de-
'manded, and a re-entry made: And in caſe
'the leſſee or leſſees, his, her, or their aſſig-
'nee or aſſignees, or other perſon or perſons
'claiming or deriving under the ſaid leaſes,
'ſhall permit and ſuffer judgment to be had
'and recovered on ſuch ejectment, and execu-
'tion to be executed thereon, without paying
'the rent and arrears, together with full coſts,
'and without filing any bill or bills for relief
'in equity, within ſix calendar months after
'ſuch execution executed; then, and in ſuch
'caſe, the ſaid leſſee or leſſees, his, her, or their
'aſſignee or aſſignees, and all other perſons
'claiming and deriving under the ſaid leaſe,
'ſhall be barred and foreclоſed from all relief
'or remedy in law or equity, other than by
'writ of error, for reverſal of ſuch judgment,
'in caſe the ſame ſhall be erroneous, and the
'ſaid landlord or leſſor ſhall from thenceforth
'hold the ſaid demiſed premiſſes diſcharged
'from ſuch leaſe: And if, on ſuch ejectment,

'verdict

' verdict ſhall paſs for the defendant or defen-
' dants not confeſſing *leaſe*, *entry*, and *ouſter*;
' then, in every ſuch caſe, ſuch defendant or
' defendants ſhall have and recover his, her,
' and their full coſts: Provided always, that
' nothing herein contained ſhall extend to bar
' the right of any mortgagee or mortgagees of
' ſuch leaſe, or any part thereof, who ſhall not be
' in poſſeſſion, ſo as ſuch mortgagee or mortga-
' gees ſhall and do, within ſix calendar months
' after ſuch judgment obtained, and execution
' executed, pay all rent in arrear, and all coſts
' and damages ſuſtained by ſuch leſſor, perſon
' or perſons entitled to the remainder or rever-
' ſion as aforeſaid, and perform all the cove-
' nants and agreements, which, on the part
' and behalf of the firſt leſſee or leſſees, are and
' ought to be performed.

' And be it further enacted by the authority
' aforeſaid, That in caſe the ſaid leſſee or leſ-
' ſees, his, her, or their aſſignee or aſſignees,
' or other perſon or perſons claiming any right,
' title, or intereſt in law or equity, of, in, or
' to the ſaid leaſe, ſhall, within the time afore-
' ſaid, file one or more bill or bills for relief, in
' any Court of Equity, ſuch perſon or perſons
' ſhall not have or continue any injunction
' againſt the proceedings at law on ſuch eject-
' ment, unleſs he, ſhe, or they, do or ſhall,

'*within forty days next after a full and perfect*
'*answer* ſhall be filed by the leſſor or leſſors
'of the plaintiff in ſuch ejectments, *bring into*
'*Court*, and lodge with the proper officer, *ſuch*
'*ſum or ſums of money* as the leſſor or leſſors
'of the plaintiff in ſuch ejectment ſhall, in his,
'her, or their anſwer, ſwear to be due and in
'arrear, over and above all juſt allowances,
'and alſo the coſts taxed in the ſaid ſuit, there
'to remain till the hearing of the cauſe, or to
'be paid out to the leſſor or landlord on good
'ſecurity, ſubject to the decree of the Court:
'And in caſe ſuch bill or bills ſhall be filed
'within the time aforeſaid, or after execution
'is executed, the leſſor or leſſors of the plain-
'tiff ſhall be accountable only for ſo much,
'and no more, as he, ſhe, or they, ſhall really,
'*bona fide*, without fraud, deceit, or wilful ne-
'glect, make of the demiſed premiſes, from
'the time of his, her, or their entering into
'the actual poſſeſſion thereof; and if what
'ſhall be ſo made by the leſſor or leſſors of the
'plaintiff, happen to be leſs than the rent re-
'ſerved on the ſaid leaſe, then the ſaid leſſee
'or leſſees, his, her, or their aſſignee or aſſig-
'nees, before he, ſhe, or they, ſhall be reſtored
'to his, her, or their poſſeſſions, ſhall pay ſuch
'leſſor or leſſors, or landlord or landlords,
'what the money ſo by them made fell ſhort

'of

'of the reſerved rent, for the time ſuch leſſor
'or leſſors of the plaintiff, landlord or land-
'lords, held the ſaid lands.

'Provided always, and be it further enacted
'by the authority aforeſaid, That if the tenant
'or tenants, his, her, or their aſſignee or aſſig-
'nees, do or ſhall, at any time before the trial
'in ſuch ejectment, pay, or tender to the leſſor
'or landlord, his executors or adminiſtrators,
'or his, her, or their attorney in that cauſe, or
'pay in to the Court where the ſame cauſe is
'depending, *all the rent and arrears, together*
*'with the coſts;* then, and in ſuch caſe, all
'further proceedings on the ſaid ejectment
'ſhall ceaſe and be diſcontinued: And if ſuch
'leſſee or leſſees, his, her, or their executors,
'adminiſtrators, or aſſigns, ſhall, upon ſuch
'bill filed as aforeſaid, be relieved in equity,
'he, ſhe, or they ſhall have, hold, and enjoy the
'demiſed lands, according to the leaſe thereof
'made, without any new leaſe to be thereof
'made to him, her, or them.'

'This Statute was copied (ſays Judge Black-
'ſtone *) from the antient writ of *Ceſſavit*,
'and may be ſatisfied and put an end to in a
'ſimilar manner, by tender of the rent and
'coſts within ſix months after.'—The preamble much reſembles that of our Act of Sederunt 1756.—Let us compare them together.

The

* Vol. III. p. 233.

The proviſo in the Statute is intended to aid landlords who have a right of re-entry upon arrears being due, *i. e.* as we ſay, by clauſes irritant, and agreements to remove without proceſs. —Our ordinance 1756 allows the heretor to *declare* that irritancy before the inferior Judges, and to remove the tenant. Though the action of declarator implies equitable powers in all other caſes, yet here its nature is altered: if the year's rent has truly been incurred, the forfeiture is compleat; the irritancy remains only to be *declared* by the Sheriff, and the tenant has no relief either in law or equity.—Thus, tho' a tenant paid up his arrear, and obtained a diſcharge three days after the commencement of the proceſs, the Sheriff, by authority of the Act, decreed him to remove, becauſe the arrear had once been *actually incurred*. The Court, indeed, relieved from this, and found that it behoved the arrear to be due at the date of the decree, December 1763, *Campbell* contra *Robertſon* *.—If this deciſion is followed, the rent may be paid in to Court; but the dependence is ſo ſhort, that it will afford relief in very few inſtances.

The Britiſh Statute, in the caſe where rent is half-yearly due, allows the Landlord to ſerve

* According to the letter of the Statute, the judgment of the Sheriff was right.

ſerve a declaration in ejectment, *without previous entry or demand.*—The old form is thus ſo far ſhortened by force of the conventional clauſe: there is no ceremony of *entering*, and no *caſual ejector*; but the declaration, in place of being ſerved upon a ſtranger, and that ſtranger giving notice, is now ſerved at once upon the tenant, and imports nothing more than our *Summons of declarator and removing upon the 5th clauſe of the Act* 1756.—The Engliſh mode of ſerving that declaration introduced by this Act, ſo exactly reſembles our forms in warnings and removings, that one would be apt to think the former borrowed from the latter. — The confeſſion of the *leaſe*, *entry*, and *ouſter*, means no more than that the defender acknowledges his being properly *brought into Court*; or, as we would ſay, that the *ſummons and execution are unexceptionable.*—No proceſs, by our late Act, can be brought, till a full year's rent becomes due, in every caſe. This is by no means *leſs ſevere* than the Engliſh Statute. The tenant is allowed, by the latter, *ſix months* even after judgment*, to get relief by a bill in Chancery, which is equal to our year's rent. But the great, the material difference is—no action upon the Statute is competent, where there remains *ſtocking, or effects*

* This circumſtance is equal to a delay of ſix months more at leaſt, where delay is wanted by the party.

*effects upon the land.* Accordingly, it muſt appear upon the trial, 'That no ſufficient diſtreſs 'was to be found upon the demiſed premiſſes, 'countervailing the arrear then due.'

By our Law, as given us in the 1756, the extent of a tenant's moveables, or ſtocking, though enough to diſcharge four times the arrear, affords no defence. 'Tis ſufficient that he has not paid rent for a year.—May it not happen (nay it has frequently happened) that the tenant cannot make money of his produce? Does not this ſhock the antient and humane principle of our Law, which diſcharges a man's lands to be ſeized, while he has moveables to be taken in payment? and, to a tenant, his poſſeſſion is the ſame as property to an heretor.—What claim has the landholder, but for the produce of his lands?—To that alone he truſts in the contract of leaſe; and therefore, while the produce is in his power, he cannot be ſaid to be injured, and ought not to be allowed to ſtretch his arm further againſt the labourers of the ground.—The Engliſh tenant is allowed, by the Statute itſelf, to pay his arrears:—the moment this is done, and coſts diſcharged, his fears are over. But, by the Scottiſh Act, the exiſtence of the arrear itſelf *works a forfeiture* of his leaſe, not indeed *directly*, *but with equal certainty in the end:* For, how are tenants thus

expoſed

expoſed in a public Court, to find caution for five years ſubſequent rent?—The demand muſt nine times in ten ruin the individual. If the year's arrears be paid up, are not the parties in *ſtatu quo?*—Is not all the ſecurity originally truſted to, *i. e.* the ſtocking and induſtry of the leſſee, remaining?—What title, then, has the Maſter to more, in law, or in common ſenſe?

By the antient proceſs of *Ceſſavit*, caution for terms to come was required of the tenant: but it will be remembered, that it not only behoved him to be *two years in arrear*, but it muſt have been further eſtabliſhed, that the lands had lain *freſh, and unoccupied for two years.*—Here was a ſolid foundation for a demand of ſecurity. The Maſter had nothing elſe to truſt to: he had no produce open to diſtreſs, and could place no confidence in the induſtry of a tenant capable of ſuch neglect.—The Law itſelf eſtabliſhed a preſumption againſt him, which he was obliged to take off by finding *bail.*—The Act we are conſidering, is ſilent upon this head. The Legiſlature preſumed arrear to be the conſequence of neglect of labour; and as it paved the way to certain recovery, either of the arrears, or of the poſſeſſion, the matter of neglect, or, as we term it, *deſertion*, is left to be remedied by the antient proceſs.—*Not ſo* our Act of Sederunt.—'If the tenant incurs a year's rent, *or* ſhall

'desert his possession, and leave it unlaboured 'at the usual time of labouring; in these, *or* 'either of these cases, the action may be brought, 'and the tenant must find caution for five 'years,' which is, in other words, *he must remove*. —Thus, tho' the rent be regularly paid, the tenant may be distressed, and attached by his Master, under this Act.

What their Lordships considered to be *desertion* of a farm, is not described; and a general term in statutory law, is a vice *in substantialibus*. They must have meant something different from leaving the lands in *fresh*, for the desertion is coupled with the words 'and leave the lands 'unlaboured.'—If it is meant that the tenant removes his family, there are many cases where he must do so.—Perhaps he takes a larger farm. —Perhaps there is not accommodation for him on the land; and tho' there is, the tenant resides in a village unconnected with it. The quarel of the heretor, then, must be confined to the leaving the lands *unlaboured at the usual time of labouring*. These words are devoid of precision, and ought not to found any penal consequence. —In our very uncertain climate, it cannot be justly said that we have an *usual time of labouring*.—This enactment puts it in the power of the Master to bring a vexatious and oppressive action against his tenant; and I am informed,

that

that inſtances are every day to be met with in the inferior Courts.—I appeal to the eſtabliſhed form of their libel.—The circumſtance of deſertion is there ſtated as a *word of ſtyle*, without a meaning; and a part of a farm, nay a *ſingle field*, left unlaboured, when the landlord is pleaſed to think it ought to have been otherwiſe, is made *a ground of action.*

It is in vain to ſay, that none of theſe abuſes will be ſuffered by the Court of Seſſion: nobody can doubt of it.—The Honourable Judges have repreſſed them on every occaſion with becoming ſpirit. But ſtill a law, the words of which may be ſtretched to cover oppreſſion, muſt be a *bad law:* it gives an advantage to one part of the ſubjects againſt the other: it puts this advantage in the hands of that claſs, whoſe ſituation in life gives them a ſufficient ſuperiority.—Many tenants, I am told, ſink under the weight of this Act of Sederunt, without a thought of oppoſition; and the remarkable inſtance of its abuſe I formerly mentioned, came out entirely *by accident*, and not by means of the individual—He felt the iron-hand of oppreſſion, but he imagined the law had *authoriſed it.*

The Britiſh Statute gives no relief againſt the proceſs of ejectment, unleſs the arrear is paid in to Court, which arrear may be delivered to the Maſter, upon ſecurity.

The Sheriff, with us, by the Act 1756, anſwers to the Court of King's Bench; for he ought to judge according to the letter of the Act of Sederunt.—The Court of Seſſion becomes our Court of Equity, where alone the tenant can ſeek relief; and the bill in Chancery correſponds to our bill of ſuſpenſion or advocation. An injunction to *ſtay proceedings at law*, is granted upon the Chancery bill; we obtain a *ſiſt* upon our bills. The application in Scotland may be refuſed, and acceſs denied to our Court by a ſingle Judge: and it is the purpoſe of the ſixth article of the Act of Sederunt, to render the admiſſion into Court ſtill more difficult. Tho' *one Judge* may refuſe, it requires *two*, or the whole Court, to paſs the bill: but if the tenant obtains this, he muſt find caution for the conſequences, damages, and expences; whereas, by the Britiſh Act, the arrears and taxed coſts are only paid in to Court. In ſhort, the principle of the Act of Parliament is 'the recovery of the arrears 'juſtly due by the tenant, or, in default thereof, 'the recovery of the poſſeſſion, under every 'chance to the tenant of preſerving it.'—The intention of the Act of Sederunt 1756, was doubtleſs the ſame. The public good, and the conſideration of juſtice, could alone influence our Honourable Senators: but, to judge of this ordinance by *the letter*, a ſtranger would be apt

to

to conclude, That the principle of it was 'the 'recovery of the poſſeſſion, whenever Landlords 'ſhall find it agreeable to their pleaſure or their 'intereſt.'—By the Act of Parliament, the Engliſh proprietor runs the riſk of loſing a year's rent, *in lieu of his recovery;* for, tho' the land be deſerted, according to our underſtanding of it, he cannot bring his ejectment till after *ſix months*, nor execute it in leſs than *a year* *—whereas, by the Scotch regulations, the Landlord is protected from the poſſibility of loſs, and has the advantage of every chance for deſtroying his tackſman's right.

——————————'Ye Maſters! then,
'Have mercy on the rough laborious hand,
'That ſinks you ſoft in elegance and eaſe:
'Be mindful of thoſe limbs, in ruſſet clad,
'Whoſe toil to you is warmth and graceful pride:
'And, oh! be mindful of that ſparing board,
'Which covers your's with luxury profuſe.'

THOMSON.

AFTER arraigning this ordinance of our Supreme Court, it would be partial, it would be moſt unjuſt, not to declare, That, in the execution of it, our preſent Judges ſeem actuated by the humanity which inſpired theſe lines of the poet of our country. They give the tenant every chance of preſerving his poſſeſſion: they give him every delay which the forms can afford. By

* *i. e.* If the tenant chuſes to prevent him.

By this conduct, it ſeems tacitly to be acknowledged, that the Act 1756 has been made, as the great Bacon finely expreſſes it, *upon the ſpur of the occaſion;* and that it is ſometimes more honoured in the *breach*, than in the *obſervance*.

In tracing the hiſtory of this ſubject, we have ſeen that the law and practice both of England and Scotland, were, in *the matter of removing*, (as in every other branch) originally the ſame. The entry of the Lord, the ejectment and ouſter of the Tenant, were *real*, literally underſtood, and literally executed.—The Engliſh Legiſlature ſoon reduced theſe barbarous manners into mere form and ſound.

Our early anceſtors obeyed laws of every kind with reluctance; and if, in the reign of ſome of our more ancient Princes, the matter of diſſeiſine and ejectment had been brought under controul, it is certain that all ideas of that kind were afterwards loſt. Our Nobility, and great Proprietors, continued to attack, ouſt, and eject tenants and vaſſals by force of arms; and the tenants learned to defend their poſſeſſions, and to deforce or diſſeiſe their Lords by the ſame means: hence it came to be totally forgot, that ever we had any law, rule, or order in this buſineſs. The Engliſh ſtill retain the ſhadows of their old forms,—while a ſet of new rules got footing with us, which had little apparent

apparent relation to the ancient practice; and hence, in Scotland, tenants are ſaid to be *warned* and *removed*, while, in England, the uncouth terms of remote antiquity are preſerved amidſt the gentleſt manners.—They are ſaid to be *entered* upon, *ouſted*, and *ejected*.

THERE are men, to whoſe minds the idea of property in land may be alone preſent, and who think every reſtraint upon their powers unnatural and impolitic.—Let thoſe who reaſon in this manner recollect, that the monied intereſt of the kingdom, is, by ſevere laws, reſtrained from taking annualrent, unleſs according to certain rates and terms preſcribed.—Land is the principal ſtock of every nation, and the principal ſubject of induſtry. By abuſing their right, land-holders hurt the community, more eſſentially than money-holders can do. They render miſerable the moſt uſeful and moſt laborious claſs of men: they ſtifle the exertion of that induſtry, upon which every thing depends.—Why the landed intereſt has not been laid under reſtriction, as well as the monied, can only be anſwered, by obſerving that the body of our Legiſlature have always been borrowers of money, and proprietors of land. The practice of giving land in leaſes, and other modes of beſtowing ſecurity upon the poſſeſſor, has reſtored,

in

in ſome meaſure, the natural rights of mankind; it has made the ſoil once more the common mother.—Location, the *emphyteutæ*, were unknown to Old Rome in the time of the Gracchi; and it has been well remarked, that, had they been well known, the convulſions of that period, occaſioned by the unequal diſtribution of lands, would have been prevented. Under the feudal law, the lower claſs of people was protected by the aſſiſtance given to their Chiefs, and by the mutual attachment naturally created between men equally expoſed to danger, and engaged in perpetual war.

Feudaliſm is now no more: it has diſappeared before the ſpirit of commerce.—If landlords are not influenced by manners, by feeling for their ſpecies, immediate intereſt, in theſe days, points at their induſtrious tenants only as ſpunges to be ſqueezed.—The Maſter ſtudies an inſidious vigilance, which he terms 'Attention to his affairs;' and the tenantry are oppreſſed, debaſed, corrupted.—Hence that low cunning, that little over-reaching diſpoſition, which we often blame in country-people.—Alas! theſe are the arms which Nature puts in the hands of the oppreſſed. The prevalence of ſuch vices among the lower claſs of mankind, is an unerring ſign of oppreſſion and poverty.—Go to England: there, an honeſt blunt ſimplicity

forms

forms the general character of their country-people.—It is needleſs to aſk, Why?—Public propriety, and ſolid improvements, have always attended the wiſe, humane, and generous adminiſtration of the Landlord's private right. And it is an obſervation of the moſt judicious political writers, That England owes its luſtre, and its power, to her Nobility and Gentry having far excelled the Peers of all other nations, in this public virtue*.

* Eſſay on Property in Land.
Hints to Gentlemen of Landed Property.

*N. B.* The following deſcription of the French Peaſantry, is given, as it were but yeſterday, by Monſ. de St Lambert, the elegant Author of *Les Saiſons*——

'Helas! dans nos climats, le peuple des hameaux,
'Rendu ſtupide enfin par l'éxces de ſes maux,
'Ne ſait point par ſon art, ſeconder la nature;
'L'habitude et l'inſtinct dirigeant ſa culture,
'Il n'invente jamais, et tremble d'imiter,
'Pour ceſſer d'etre pauvre, il n'oſe rien tenter;
'Il traine avec effort ſa vie infortunée,
'Et penſe qu'aux douleurs les dieux l'ont condamnée.'

# APPENDIX.

## N° I.——See page 45.

*RENUNCIATION of the Poſſeſſion of Lands.*

'BE it kenn'd to all men, me A. B. tenant 'in ———, to have renounced, diſcharged, and *ſimpliciter* overgiven, and for me, 'my heirs and aſſignees, renounces, diſcharges, 'and *ſimpliciter* overgives all right, title, tacks, 'kindneſs, good-will, property and poſſeſſion, 'which I have, had, or may pretend to have, 'any manner of way, to the occupation of the 'town and lands of ————, poſſeſſed by me 'in virtue of a tack from C. D. dated the —— 'day of ————, which ceaſes and expires 'at the term of Whitſunday next, and that 'to and in favours of the ſaid C. D. heretable 'proprietor thereof, and his heirs; with power 'to him, by his tenants, ſervants, ſubtenants, 'and others in his name, peaceably to enter 'thereto at the ſaid feaſt and term of Whit-

'ſunday next; and to occupy, labour, ſet, uſe,
'and diſpoſe thereupon, in all time coming
'thereafter. — *Likeas*, I grant myſelf, wife,
'bairns, ſervants, family, ſubtenants, goods
'and gear, lawfully and orderly removed there-
'from at the ſaid term of Whitſunday next,
'but any warning or decreet of removing: And
'binds and obliges me and my foreſaids, to
'flit, redd, and remove myſelf, and my above
'written, furth and frae my occupation of the
'ſaid lands, biggings, yeards, and pertinents
'thereof, at the ſaid term; and to warrant thir
'preſents at all hands, and againſt all deadly.'

## N° II. — See page 61.

### *PRECEPT of WARNING.*

'A. Heretable proprietor of the lands and
'others under written, to — — — —
'executors hereof, conjunctly and ſeverally,
'greeting.—It is my will, and I deſire you, that
'incontinent this my precept ſeen, ye paſs,
'forty days preceding the term of Whitſunday
'next to come, and lawfully warn, conform to
'the Act of Parliament made concerning warn-
'ing of tenants to remove from lands, the

'perſons

' perſons after named, pretended tenants, and
' others under written, viz. *(Here inſert the*
' *names of the tenants, and of the lands, as in the*
' *tacks, or in the heretors rights)* to flitt and re-
' move themſelves, their wives, bairns, fami-
' lies, ſervants, ſubtenants, cottars, goods and
' gear, forth and from the ſaid lands and others
' above written, with the pertinents; and to de-
' ſiſt and ceaſe from them, and leave the ſame
' void and redd at the ſaid term of Whitſunday
' next to come; each of the ſaid perſons for their
' own parts, ſo far as they occupy thereof; to
' the effect that I, my tenants, ſervants, and
' others in my name, may enter thereto, peace-
' ably bruik, joice, occupy, labour, and ma-
' nure, ſet, uſe, and diſpoſe thereupon as my
' heritage, at my pleaſure, in time coming, con-
' form to my infeftment, and ſaſine thereof; and
' that ye uſe the whole remanent order of
' warning againſt the fore-named perſons, for
' removing from ———, and others above ſpe-
' cified, preſcribed by the Acts of Parliament
' made thereanent: Certifying them, if they
' do in the contrary, and continue to occupy,
' labour and poſſeſs the lands and others fore-
' ſaid, after the ſaid term of Whitſunday next
' to come, they ſhall be holden and reputed
' violent poſſeſſors thereof, and compelled to
' make payment of the violent profits of the

' ſame,

'ſame, with all rigour.—According to juſtice,
'as ye ſhall anſwer to me thereupon. The
'which to do, I commit to you conjunctly
'and ſeverally my officers in that part, full
'power by this my precept (written by ——)
'and ſubſcribed by me, at ———

## No. III.——See page 86.

### *INSTRUMENT of Ejection and Poſſeſſion.*

AT

'THE which day, *&c.* compeared perſonally
'upon the ground of the lands of A. B.
'and with him C. meſſenger and ſheriff in
'that part ſpecially conſtitute, holding in his
'hands Our Sovereign Lord's letters of ejec-
'tion, direct at the inſtance of the ſaid A. he-
'retor, againſt D. pretended tenant and occu-
'pier of the lands, commanding and charging
'all meſſengers-at-arms and ſheriffs in that
'part, to paſs, and in his Majeſty's name
'and authority, eject and output the ſaid D.
'and his wife, bairns, *&c.* forth and from the
'lands and others foreſaid, with the pertinents,
'and to enter the ſaid A. B. and his ſervants,
'and others in his name, to the actual, real,

'and

'and void poſſeſſion thereof, and to hold, for-
'tify, and aſſiſt them therein, as the ſaid let-
'ters of ejection, dated, *&c.* more fully bears:
'And then and there the ſaid M. taking in his
'hands the ſaid letters, and being deſired by
'the ſaid A. to proceed to the execution of his
'office in the premiſſes, conform to the tenor
'of the ſamen in all points, did, in obedience
'thereto, paſs to the dwelling-houſe of the
'ſaid D. F. upon the ground of the ſaid lands,
'and there ejected and outputted the ſaid D. F.
'his wife, bairns, &c. tenants, &c. together
'with the whole articles of houſehold-furniture,
'conform to a particular inventary thereof
'made in the order of out-putting the ſame,
'ſubſcribed by the ſaid C. the officer above
'mentioned, and the witneſſes above deſigned,
'to which reference is hereby made *brevitatis*
'*cauſa*; and thereafter the ſaid C. extinguiſhed
'the fires in the houſe, locked the doors, and
'delivered the keys thereof to the ſaid A. B.
'heretor, and thereby entered the ſaid A. his
'ſervants, and others in his name, to the peace-
'able poſſeſſion thereof, conform to the tenor
'of the ſaid letters of ejection, laws and prac-
'tique of this realm, in all points. *Laſtly*,
'Upon all and ſundry the premiſſes the ſaid
'A. B. aſked and took inſtruments, &c.'

No. IV.

## No. IV.——See page 86.

*INSTRUMENT taken upon the Poſſeſſion of Lands, given by a Sheriff in obedience to Letters of Ejection and Poſſeſſion.*

AT *the* *day of*

'THE which day, compeared perſonally, an honourable perſon A. B. Sheriff-depute of the ſheriffdom of Edinburgh, and paſſed with me and the witneſſes after mentioned, to the ground of the lands of , formerly poſſeſſed by C. D.; and, at command of the letters within ſpecified, and in obedience thereunto, entered E. F. perſonally preſent, to the poſſeſſion and occupation of the ſeveral lands after ſpecified, and that by deliverance to him of the ſtreiked plough by the ſtilts thereof, and certain furs were tilled therewith; and the ſaid A. B. the Sheriff proteſted, that he had fulfilled the command of the ſaid letters: Whereupon the ſaid E. F. to whom poſſeſſion had been given, aſked and took inſtruments, ane or mair, in the hands of me Notary Public. Theſe things were ſo done, &c.'

*This laſt Form was uſed in the caſes where diſputed lands, lands wadſetted,* &c. *were decreed to be reſtored to the reverſers, or proper owners.*

No. V.

## N° V.——See page 93.

*FORM of a Precept of Removing and Ejection, contained in Decreets pronounced by the Sheriffs.*

'ORDAINS the officers of the ſaid ſheriff-
'dom to charge the ſaid A. B. to flitt and
'remove himſelf, wife, bairns, family, ſubte-
'nants, ſervants, cottars, and dependers, goods
'and gear, furth and from the ſaid *(Here the*
'*ſubjects in the decerniture are repeated)* and to
'leave the ſame void and redd at the ſaid
'term of Whitſunday next, to the end the
'ſaid C. D. purſuer, or others in his name, may
'then enter thereto, and peaceably poſſeſs and
'enjoy the ſame in all time coming, and that
'within 48 hours after the ſaid term of Whit-
'ſunday next [*if the charge to remove be gi-*
'*ven before the term; or within* 48 *hours next*
'*after the charge, in caſe the ſame is not gi-*
'*ven after the term of Whitſunday*] under the
'pain of ejection; wherein if the ſaid A. B.
'defender fail, that the ſaid officers eject, re-
'move, and put forth the ſaid defender and
'his wife, bairns, family, ſervants, ſubtenants,
'and cottars and dependers, goods and gear,
'furth and from the ſaid ſubjects *(Here repeat*

 'them)

'*them*) and keep, hold, and detain them furth 'thereof; and enter and poſſeſs the ſaid C. D. 'purſuer, or others in his name, therein; and 'maintain, uphold, and defend them in the 'peaceable poſſeſſion thereof; and to cauſe in-'ventary of the haill goods and gear ſo to be 'ejected; and, if needful, to make gates and 'doors open and patent, and uſe his Majeſty's 'key for that effect; and alſo to do and obſerve 'the haill remanent order anent removings pre-'ſcribed by the Act of Parliament; and alſo 'ordains precepts, and all other executions 'needful, to paſs and be direct hereon in form 'as effeirs.'

Ex. E.B.H.

*F I N I S.*

# ERRATA.

| Page | Line | |
|---|---|---|
| 12. | 11. | *For* leſſer *read* leſſor, |
| 36. | 11. | Put a comma after the word *wadſetters*, |
| 43. | 17. | *For* that *read* the |
| 49. | 21. | *For* the poſſeſſion of liferenters, *read*, the poſſeſſion of *the tenants* of liferenters. |
| 52. | 21. | *For* M'Dougal *read* M'Dowal, |
| 63. | 29. | For *M'Braes* read *M'Braer* |
| 86. | 29. | *Vide* Appendix, No. 3. and 4. |
| 95. | 27. | The references ſhould be altered thus—The * put to the Act of Parliament, and the † to Monteſquieu. |
| 136. | 3. | The following Note ſhould have followed the quotation from Lord Coke:—'Here we diſcover the 'principle of our ancient Scottiſh Act of Parliament, which protected the tenants of liferenters, 'ward-lands, &c. Theſe tenants did not know 'the end of their terms.' |